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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

CHARLES N. SLAYTON,

Petitioner,

vs.

BECHTEL POWER CORPORATION; SOUTHERN CALIFORNIA EDISON COMPANY, A Corporation; BECHTEL CONSTRUCTION COMPANY, INC.,

Respondents.

On Appeal from the Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

LEE W. LANDRUM
Attorney at Law
6994 El Camino Real, Suite 208A
Carlsbad, California 92009

Telephone: (619) 438-6864

Attorney for Petitioner,
Charles N. Slayton

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QUESTIONS PRESENTED

A.

In a case wherein the issues presented to the state court on appellate review in effect draw into question the federal question of the constitutionality of a statute permitting the trial judge to grant judgment notwithstanding the verdict as

being repugnant to the Seventh Amendment of the United States Constitution as is the case here, does the United States Supreme Court have jurisdiction to decide from the record and an examination thereof, whether or not the federal question has been presented to the state courts and necessarily passed upon?

B.

In a case where a duly constituted jury to which a complete state court trial has been presented, has decided that the evidence presented to it under instructions by the court, is sufficient to sustain the plaintiff's burden of proving that a defendant employer wrongfully discharged the plaintiff employee without reasonable cause and by the use of sham and pretext sufficient to constitute bad faith, is the state trial court's reversal of the jury verdict awarding damages to the plaintiff

employee and punitive damages for the exhibition of bad faith by said employer, under the California state statute authorizing trial courts to grant judgments notwithstanding the verdict [California Code of Civil Procedure §629], a violation of the Seventh Amendment to the United States Constitution and consequently the kind of plain constitutional error that this Court can and should correct?

C.

In a case where the trial judge has granted both judgment notwithstanding the verdict and in the alternative a new trial under California Code of Civil Procedure §§629 and 659 respectively, to an employer defendant, after a jury verdict in favor of plaintiff employee, may the Court of Appeal of the State of California and the Supreme Court of the State of California affirm the trial court's order granting judgment

notwithstanding the verdict to the employer defendant without considering or passing upon the trial court's alternative granting of said employer's motion for new trial where the jury verdict has been in favor of the plaintiff employee based upon the evidence that the employer has wrongfully discharged the employee through the use of bad faith, sham and pretext as determined from the evidence submitted to the jury?

D.

Is the question of the constitutional vitality and validity of Section 629 of the California Code of Civil Procedure, as applied in this case by the trial court, the Court of Appeals, and the Supreme Court of the State of California, of sufficient substantiality to warrant this Court to exercise its jurisdiction in reviewing the matter on the granting of this requested Writ of Certiorari?

E.

In a case where the jury has awarded contract damages and bad faith damages in a wrongful discharge situation such as is present in this case and has also awarded punitive damages for violation of the covenant of good faith and fair dealing which the California Supreme Court has declared is a covenant of every contract made in the State of California [in Seaman's Direct Buying Service Inc. v. Standard Oil Co., 36 Cal.3d 752, 768, 206 Cal. Rptr. 354, 362 (1983)], does the California Supreme Court holding in Foley v. Interactive Data Corp. at 47 Cal.3d 654, 254 Cal. Rptr. 211 (1988), to the effect that the only damages available for a breach of the covenant of good faith and fair dealing in an employment case only are limited to contract remedies thus eliminating tort damages in wrongful

discharge cases involving sham, pretext and violations of the covenant of good faith and fair dealing as in this case with the exception of certain cases involving a protection of public rights under public policy, a violation of the Fifth and Fourteenth Amendments to the United States Constitution?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED.

[Rule 21(b), Rules of the United States Supreme Court.]

The list of all parties to the proceeding in this Court whose judgment is sought to be reviewed are:

1. Charles N. Slayton.
2. Bechtel Power Corporation.
3. Bechtel Construction Inc.

28 U.S.C. §2403(b) may be applicable and this document is concurrently herewith being served upon the Attorney General of the State of California.

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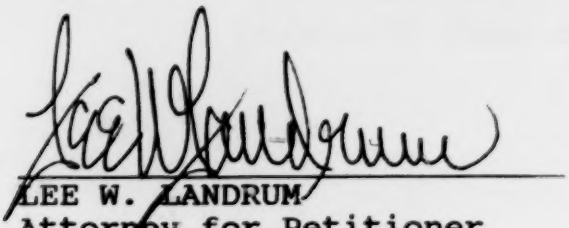
CERTIFICATION TO THE ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA

I CERTIFY TO THE ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA THAT THE CONSTITUTIONALITY OF THE STATUTE SET FORTH IN CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 629 IS HEREIN DRAWN INTO QUESTION.



LEE W. LANDRUM
Attorney for Petitioner

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OPINION BELOW, APPROVED BY CALIFORNIA SUPREME COURT

The Opinion of the Court of Appeal, approved by the California Supreme Court was certified by the intermediate appellate court of that state for non-publication; however, a copy is attached to the Appendix as Appendix B for this Court's

convenience. The California Supreme Court's approval of said Opinion is attached to the appendix as Appendix A, i.e., that Court's denial of this petitioner's request for review.

JURISDICTION

Petitioner, CHARLES N. SLAYTON, respectfully prays that a Writ of Certiorari be issued to review the refusal of the California Supreme Court to review the Opinion of the Court of Appeal, Fourth Appellate District, Division One, of the State of California, filed on May 3, 1989. That refusal affirmed the Opinion of the said Court of Appeal which had affirmed the trial court's granting of respondent's motion for judgment notwithstanding the verdict and new trial, after a jury verdict had been rendered in the trial court in favor of CHARLES N. SLAYTON, petitioner here and plaintiff therein, against BECHTEL POWER CORPORATION, respondent here

and defendant therein, CHARLES N. SLAYTON sued BECHTEL POWER CORPORATION for breach of employment contract and breach of the covenant of good faith and fair dealing and received a $1,052,331.00 jury verdict which included $600,000.00 for punitive damages, after the case had been submitted to the jury and the jury had been fully instructed by the court.

The trial court in San Diego County had granted the defendant's motion for judgment notwithstanding the verdict, under California Code of Civil Procedure §629, and for new trial under California Code of Civil Procedure §659, and SLAYTON appealed in the California Court of Appeal, Fourth District, from those orders. The State Court of Appeal held:

> "Because there is no substantial evidence Bechtel wrongfully terminated Slayton so as to support the jury verdict, we affirm the judgment notwithstanding the verdict and need not address the grant of new trial. (Code Civ. Proc.,

[Section] 629.)" [See Appendix B, page 1.]

Thereupon, petitioner requested the California Supreme Court to review the Opinion of the Court of Appeal, and said request was officially denied on May 3, 1989. [See Appendix A.]

Petitioner now asks this Court to review the refusal of the Supreme Court of the State of California to review the Opinion of the Court of Appeal of that state, assuming that under this Court's holding in Minneapolis S.T.P.&S.Ste. M.R.Co. v. Rock (1929) 279 U.S. 410, 412, 49 S.Ct. 363, 73 L.Ed. 766, the refusal of the highest state court to review a decision of a lower court may be considered an approval of the conclusion reached by the lower court and is in effect an affirmance of the lower court's judgment.

Since the basic ingredient of this petition to this Court is the question of the constitutional validity of Section 629

of the California Code of Civil Procedure as used by the Court of Appeal of the State of California and the Supreme Court of the State of California in denying petitioner his right to a civil jury trial under the Seventh Amendment to the United States Constitution, it is respectfully submitted that this Court has jurisdiction to issue its Writ of Certiorari by reason of 28 U.S.C. §1257.

The California Court of Appeal's Opinion was filed on February 16, 1989. On March 22, 1989, petitioner timely filed a Petition for Review of the Opinion with the California Supreme Court, the highest court of review in the state. Thereafter, on May 3, 1989, the California Supreme Court In Bank issued and filed its Order Denying Review After Judgment by the Court of Appeal, Fourth District, Division One, as set forth in the appendices hereto. This petition is being filed within the time

permitted by 28 U.S.C. §§2101, 2104. This Court has jurisdiction to review the refusal of the California Supreme Court to grant review of the Opinion of the California Court of Appeal by Writ of Certiorari pursuant to 28 U.S.C. §§1254 and 1257; and Minneapolis S.T.P.&S.Ste., M.R. Co. v. Rock, (supra.).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Right to Jury Trial in a Civil Case Amendment, U.S. Constitution, Seventh Amendment (Appendix C) - Fifth and Fourteenth Amendments to the United States Constitution.

CALIFORNIA COURT OF APPEALS (APPENDIX B) STATEMENT OF THE CASE

The defendant BECHTEL POWER CORPORATION ("BECHTEL") was a general contractor for SOUTHERN CALIFORNIA EDISON COMPANY ("EDISON"), a licensee of the San Onofre Nuclear Power Plan in Southern California.

The BECHTEL management hierarchy pertinent to this case was Edward Molnar, vice-president and manager of construction, Dick George, project superintendent, and petitioner SLAYTON, swing-shift (or night-shift) superintendent. Under SLAYTON were the general foreman, Charles Cazares, followed by welding foreman, William Steven Vealey.

San Onofre, Unit One, known as SONGS I, where the incidents involved in this case occurred, was shut down from February of 1982 to November of 1984 for the purpose of upgrade. BECHTEL and EDISON were working on the plant during a "return-to-service" outage to return the plant to restarting standards required by both the California Public Utilities Commission and the Nuclear Regulatory Commission.

One of BECHTEL's working procedures required a welder to mark his identification number, known as a "P"

number adjacent to a weld that he or she had done. This was a temporary identification and the permanent record was in various written documents including one termed a "WR6" form, which had to be filled out by the welder when drawing materials from the supply room to make a weld before the welder attempted to do so. In this way the supply room attendants could check the qualifications of any welder to the work proposed, before the actual work was done, and provided a permanent record as to the identity of the person who did a particular weld as well as where the weld was to be situated. The record also contained a full description of the type of material issued, used, and where it was placed, and how much of it was used, as well as the time.

The term "buying off" a weld refers to the process of accepting or rejecting it by a quality inspector. When a weld was finished, the inspector would visualize it

for its compliance to pre-set standards. After the complete inspection and verification of the information concerning the weld, it was painted over and the "P" number adjacent to it was obliterated, leaving only the written record of the weld.

SLAYTON, on a career track with BECHTEL for fourteen continuous years during which he had worked himself up from an electrician's apprentice on a $900.00 per month salary to a superintendent on a $54,000.00 per annum salary, with constant commendation from his superiors for doing exemplary and outstanding work for his employer and his employer's customers such as SOUTHERN CALIFORNIA EDISON COMPANY, on August 5, 1984, was given a welding package from the welding inspector consisting of a folder with a sticker-type note stating "Welds O.K. -- needs 'P' number." SLAYTON gave the package to general foreman

Cazares, and told him to take welding foreman Vealey with him to the rod room (supply room aforementioned) to determine who had drawn welding rods for that particular weld. The pair were unable (so they said to SLAYTON, to find the welding record.) SLAYTON told them to try again and make verification with the rod-room attendants. They again reported to SLAYTON that they were unable to find the identification of the welder. SLAYTON, under the pressure of time and a schedule to be met so that SONGS I could get back on line without penalty to his employer, then requested Vealey to inspect the weld, and, if the workmanship and criteria for passing the weld were compatible with his own, to place his "P" number on it, while they attempted to further find the written record.

Unknown to SLAYTON and without SLAYTON's authority, Vealey drew rod

material from the rod-room as though he were going to do the weld himself. He trashed the rods, and made a new written record on a WR6 form showing his own "P" number and then put that "P" number on the subject weld, as though he had done it. He told Cazares, but did not tell SLAYTON that this would validate the whole procedure. Cazares testified that because Vealey had been a welder for BECHTEL for a long time, he depended upon Vealey and his expertise in handling the matter, and told SLAYTON nothing about his agreement and conversation with Vealey. The weld was inspected and accepted without change except for the addition of Vealey's "P" number.

SLAYTON in the meantime, since July of 1984, had been dissatisfied with Vealey's overall performance, and on August 8th, reduced him from foreman to journeyman after a line rupture occurred in a weld

Vealey had failed to inspect. This was without knowing that Vealey had falsified the welding rod-room papers (i.e. the WR6 form) to reflect that he had performed the weld in question. The Appellate Court also found that Cazares and the rod-room attendants all knew that Vealey was falsifying the weld papers, but said nothing to SLAYTON about it. SLAYTON, of course, according to the Appellate Court Opinion, did not know Vealey had falsified the papers, and he had not told Vealey to do so.

After SLAYTON had reduced Vealey from foreman to journeyman for reasons not connected to Vealey's falsification of records since SLAYTON had no knowledge of same at the time, Vealey threatened SLAYTON that if he was not reinstated as a foreman he would place a complaint (he did not state for what) in the "NRC drop box." Angered by this attempt at blackmail,

SLAYTON put Vealey on the lay-off list, and on August 10, 1984, Vealey was laid off based on a reduction in force. Project superintendent George testified that he had instructed SLAYTON to reduce Vealey to a journeyman and then lay him off because of Vealey's failure to inspect a weld previous to this incident, after SLAYTON had told him (George) of Vealey's previous conduct.

Vealey, after the lay-off, wrote a complaint to the NRC and copy to BECHTEL and EDISON stating the UNTRUTH that he was ordered to falsify the rod-room records by SLAYTON and that he didn't want to be prosecuted for falsification of documentation relating to welding. The Court of Appeal relates this complaint as follows:

> "... On August 10, Vealey submitted a nuclear safety concern which described the 'P' number incident as follows. When they could not find the rod papers to identify the welder, he jokingly said to his supervisor [Cazares],

'I can draw rod on the pipe support number and even though I won't weld I will then put my welder's identification number on it'; nothing more was said at that time. A few hours later he stopped to speak with Slayton, and was told to go ahead with what his supervisor and he had spoken about earlier. Vealey asked Slayton if Slayton knew what he was talking about, and Slayton said it was an opportunity to get an easy completion. Vealey did what he was ordered to do; he went into the rod room and filled out a WR6 for the weld signed by himself for rod he did not weld; turned the rod back in; and then went into containment to put his welder's identification number on the support even though he had not welded. What came to his mind was that the NRC has prosecuted people for falsification of documentation relating to welding; and he did not want this to happen to him, as he was only following orders, and there have been numerous improprieties perpetrated in the name of production." [Appendix B, pages 7 and 8.]

On August 14, 1984, SLAYTON was relieved of his duties pending an investigation of Vealey's allegations. An investigation was conducted by BECHTEL and a report dated September 11, 1984 summarized the investigation and its

resolution, including the following items of information:

1. Vealey volunteered to draw rod and put his identification number on the weld.

2. SLAYTON admitted he asked Vealey to inspect the weld and if it was acceptable under the criteria of himself and BECHTEL, to put his "P" number on it, but Vealey withdrew the weld rod on his own.

3. On August 17, 1984, all swing shift foremen were interviewed to see if there was pressure from supervision that would compromise quality of work or accuracy of records, and none was reported.

4. On August 18, 1984, a follow-up interview was conducted with Vealey regarding two other improprieties he had alleged, which, after investigation, were found to be unsubstantiated.

5. On August 28, 1984, the weld papers for the true welder were found, and

on August 31, 1984, the welding documentation corrected. In this regard, the Court of Appeal opinion states in footnote at page 10 [Appendix B]:

> "An inspection report prepared in response to quality assurance instructions to void Vealey's 'P' number mark indicates his number was not in fact marked on the weld, but rather the correct 'P' number was already there. Vealey testified, however, he did place his number on the weld. Molnar, who made the decision to fire Slayton, testified even if he had known Vealey's 'P' number had not actually been placed on the weld, it would not have influenced his decision to fire Slayton."

On August 31, 1984, management met with Vealey to review the results of the investigation of his allegations and to offer him re-employment.

At trial, Molnar testified Vealey was rehired because of concerns for his status as a whistleblower; and SLAYTON was fired because he directed Vealey to place his "P" number on a weld he did not do in violation

of a well-established procedure known to SLAYTON.

The rod room engineers were not terminated as a result of their knowledge of the incident with Vealey. General foreman Cazares was demoted to a journeyman.

On December 21, 1984, Vealey was again laid off for a reduction in force. When he was laid off, Vealey again threatened to go to the NRC based on his claim he was being laid off in retaliation for his whistleblowing in August. BECHTEL made its decision to resolve the ensuing legal dispute and avoid extended litigation by paying Vealey a cash settlement.

The Court of Appeal exhaustively re-examined in minute detail the entire record of evidence submitted to the jury in the underlying civil trial and determined that in actuality the evidence submitted in this trial of seven and one-half weeks of

testimony was not of such substantiality as to warrant the jury in finding for the plaintiff and against the defendant BECHTEL, even though BECHTEL did not dispute that there was sufficient evidence to support a jury finding there was an agreement that SLAYTON, an employee with a long and largely satisfactory work history and on a career track with BECHTEL, would not be terminated except for good cause. BECHTEL terminated SLAYTON for "MISCONDUCT" in falsifying company welding documents [see Appendix B, pages 10, 26 and 27], knowing that Vealey and not SLAYTON had originated the falsification of same.

The jury was fully instructed by the trial court and neither petitioner nor respondent questioned the adequacy or the correctness of the instructions in the appeals in the state courts.

The findings by the Court of Appeal in its re-examination of the facts, contrary

to the edict contained in the Seventh Amendment to the Constitution of the United States contains, among other statements, the following revealing inference which the jury of necessity must have drawn in reaching its own decision in this case, are most impactive when placed in the context of pointing up the constitutional invalidity of the California Code of Civil Procedure §629, set forth in Appendix D hereto attached:

> "... Regarding the merits of the decision to terminate Slayton, the record can support an inference that from an engineering/safety perspective his procedural violation was a minor one, but Bechtel management wanted this conclusion suppressed so that it could not be used to challenge Slayton's termination, since it needed to fire someone for 'political reasons' (i.e., based on Maisu's testimony, plus George's statement the matter was political). That is, Bechtel could have wanted to make a showing to Edison and/or the NRC that it was strict on safety so as to avoid further investigations and interference with its operations. The inference could be drawn that if not for political

> pressure to have a safe nuclear power plant, Bechtel would not have felt the need to issue the drastic sanction of termination for what could be perceived as a minor procedural violation."

Under the instructions by the trial court, the jury by its verdict in favor of the plaintiff who is the petitioner here examined the voluminous facts presented in this seven and a half week trial and determined that there had indeed been a wrongful discharge, breach of the covenant of good faith and fair dealing, intentional infliction of emotional distress, and breach of contract concerning the implied contract between SLAYTON, the employee, and BECHTEL, the employer, in the discharge of SLAYTON without good cause. We are here concerned with whether or not the trial court's, the Court of Appeal's, and the Supreme Court's decisions in this California case, re-examining the facts found to be true by the jury, and their decision based upon the law as instructed

by the trial judge, under the auspices of California Code of Civil Procedure §§629 [Appendix D] and 659 [Appendix E] is an unconstitutional application of constitutional statutes or is an application of an unconstitutional statute. We are also concerned with whether or not the recent California case entitled Foley v. Interactive Data Corp. at 47 Cal.3d 654, 254 Cal. Rptr. 211 is in and of itself an unconstitutional holding in that it violates both the Fifth and Fourteenth Amendments to the United States Constitution. The reason we are concerned with Foley is that in the event this Court grants its Writ of Certiorari as herein prayed it will be concerned with that portion of the verdict that was set aside as above set forth which awards $600,000.00 in punitive damages for the violation of the covenant of good faith and fair dealing which has been held by the California

Supreme Court to be present in every case in California -- that is except in employment contracts as held by Foley.

A brief history of Foley is necessary here. In that case the California Supreme Court rendered its decision filed on December 29, 1988. The opinion was concerned in the employment law field and particularly with the issue of wrongful discharge. The majority reversed Cleary v. American Airlines Inc. (1980) 111 Cal. App. 3d 443, holding that the damages available for a breach of the covenant of good faith and fair dealing in employment cases are limited to contract remedies. This eliminates tort damages in most wrongful discharge cases in the State of California.

The Foley Court upheld an employee's right to bring lawsuits for breach of implied and express contracts such as those involved in this case endorsing the rationale of the California case of Pugh v.

See's Candies Inc. (1981) 116 Cal. App. 3d 311. The Court stated that traditional contract principles will be applied in these particular cases but not in other cases which do not involve an employment-employer-employee relationship. The decision leaves intact the rights established in Tameny v. Atlantic Richfield Corporation (1980) 27 Cal. 3d 167, allowing employees to recover tort damages for terminations in violation of public policy; however the public policy must have been established to protect "public" versus "private" rights. A seemingly discriminatory decision and one which of course violates both the Fifth and the Fourteenth Amendments of the United States Constitution with reference to due process and discrimination. The Court also held in the Foley case that the statute of frauds does not bar oral contract claims.

It is not an invisible fact that this Foley decision is crucial to any employee and any lawyer practicing in the employment law arena.

REASONS FOR GRANTING THE WRIT

1. The case here involves issues presented to the State Court on Appellate review which in effect draw into question the federal question of the constitutionality of a statute permitting the trial judge to grant judgment notwithstanding the verdict as being repugnant to the Seventh Amendment to the United States Constitution and thus authorizes the United States Supreme Court to decide from the record and an examination thereof whether or not a federal question has been presented to the State Courts and necessarily passed upon.

2. The case here involves a verdict reached by a duly constituted state jury in state court wherein they have decided from

the evidence presented in the trial of this matter and under the instructions by the court that plaintiff has sustained his burden of proving that a defendant employer wrongfully discharged the plaintiff employee without reasonable cause and by the use of sham and pretext sufficient to constitute bad faith, and the Judge's reversal of that jury verdict awarding damages to the plaintiff employee under the California state statute authorizing trial courts to grant judgments notwithstanding the verdict, which is contended herein to be a violation of the Seventh Amendment to the United States Constitution and consequently the kind of plain constitutional error that this Court can and should correct.

3. In this case a trial judge has granted both judgment notwithstanding the verdict and in the alternative, a new trial, to an employer defendant after a

jury verdict in favor of plaintiff employee, and the Court of Appeals [the intermediate Appellate Court] of the State of California, and the Supreme Court of the State of California have affirmed the trial court's order granting judgment notwithstanding the verdict to the employer defendant after completely reviewing and taking into consideration all of the evidence that the jury had used to determine its verdict including evidence in favor of the plaintiff employee and evidence in favor of the defendant employer, and has decided that the trial court was correct in reversing the jury verdict which had been based upon evidence that the employer had wrongfully discharged the employee through the use of bad faith, sham and pretext as determined from the evidence submitted to the jury.

4. This case involves the question of the constitutional validity of Section 629

of the California Code of Civil Procedure by providing the basis for the trial court's granting of judgment notwithstanding the verdict as shown on the record of this case, and as contended herein to be violative of the Seventh Amendment to the United States Constitution and of sufficient substantiality to warrant this Court to exercise its jurisdiction in reviewing the matter on the granting of this requested Writ of Certiorari.

ARGUMENT UNIVERSAL TO ALL QUESTIONS IN THIS PETITION FOR WRIT

The basic premise upon which this Petition for Writ of Certiorari is directed to this Court, is that it becomes obvious that the application of the right of the trial court to destroy a duly rendered jury verdict in a wrongful discharge case such as the one at bar, through the application of the "thirteenth juror" designation granted it by Section 629 of the California Code of Civil Procedure is unconstitutional

in view of the Seventh Amendment to the United States Constitution.

The tenets of Section 629 of the California Code of Civil Procedure have definitely been brought into actual or threatened operation on the rights of this petitioner. This petitioner has been aggrieved by the trial court's application of its so-called right to vacate the judgment and verdict rendered in favor of the plaintiff because it disagreed with the jury's interpretation of the evidence presented to it and thus contains the substance of which this Court should take cognizance in exercising its appellate jurisdiction of that decision by the trial court, the Court of Appeals of the State of California, and the Supreme Court of the State of California. True, this Court has no right to pronounce an abstract opinion on the constitutionality of a state law. However such law must be brought into

actual or threatened operation on the rights of the individual aggrieved in order to properly fall under judicial cognizance of this Court. This Petition for Writ of Certiorari is at the instance of one who is himself immediately harmed or immediately threatened with harm by the challenged action.

The state court's decision as to whether or not it could exercise the powers given it under the so-called interpretation of California Code of Civil Procedure §629 obviously was necessary to the determination of this cause. It then presents a federal question since the United States Supreme Court must decide whether it has jurisdiction in a particular case and must determine whether the federal question was necessarily passed on by the state court. The state courts could not have rendered the decisions they rendered unless they necessarily passed on the

constitutionality of the statute under which they rendered such decisions. This Court in examining the record will so determine. The conduct of each of the state courts involved in this matter has in effect drawn into question the federal question as to the constitutionality of the statute permitting judgment notwithstanding the verdict as being unconstitutional in that it is repugnant to the Seventh Amendment to the United States Constitution as is the case here. The United States Court must decide from the record and an examination thereof whether or not that federal question had been presented to the Court and necessarily passed upon, either directly or indirectly. [Honeyman v. Hannan (1937) 300 U.S. 14, 18-19, 57 S.Ct. 350, 81 L.Ed. 476.]

It is a substantial question to investigate the petitioner's right to a jury trial and the circumscription of that

jury trial verdict by the decisions of the state courts granting judgment notwithstanding the verdict as being an unconstitutional application of California Code of Civil Procedure §629 with reference to the granting of judgment notwithstanding the verdict and an unconstitutional application of Section 659 of the California Code of Civil Procedure wherein the alternative judgment was granted, i.e., a refusal to decide whether or not Mr. SLAYTON was entitled to a new trial after the trial court had granted new trial in the alternative to the defendant employer herein. [Pederson v. Delaware, etc. Railway Co., 57 L.Ed. 1125, 229 U.S. 146, 33 S.Ct. 648 (1913).] The Pederson case is most important in that it is to the effect that a federal court cannot consistently with the provisions of the Seventh Amendment to the United States Constitution preserving the right of trial

by jury, enter judgment for the defendant notwithstanding a verdict for the plaintiff on the ground that the latter was not sustained by the evidence -- if this is true for the federal court it certainly should be true for the state court. Pacific West Cable Company v. City of Sacramento, California (1987) 672 F.Supp. 1322, holds that the Seventh Amendment to the United States Constitution requires that if there is a view of the case that makes the jury's answers consistent, the Court must adopt that view and enter judgment accordingly. In that case, a cable system operator brought suit against municipal corporations alleging that the defendants' refusal to issue it a franchise violated its constitutional rights and anti-trust laws. The Court submitted special verdicts to the jury and after the special verdicts were rendered, the Court held that (1) the government's interests

were not sufficiently substantial to justify government created artificial monopolies; (2) the operator was entitled to declaratory judgment establishing that municipal corporation's single franchising policy violated the cable operator's First Amendment rights; and (3) the operator was entitled to injunctive relief with respect to its request for permission to build and operate its cable television system. Among other things, the jury in said case concluded that cable television is not naturally a monopoly, and that there should be head-to-head competition. It further concluded that the governing authority in granting a single cable television franchise used the question of necessary monopoly as justification and that same was sham or pretext for granting a single cable television franchise just as in our case the jury concluded that SLAYTON had been fired for a motive that constituted sham or

pretext in that the motive obviously was that (1) BECHTEL CORPORATION wanted to give the political inference that it was concerned with safety in a nuclear generating station project to the government officials regulating same (the NRC); and (2) that BECHTEL wanted to appease Vealey for one reason or another. [See Court of Appeals' Opinion, Appendix B hereto, pgs. 31-38.] It should be noted that in the Pacific case the jury also concluded that the sham and pretext justification above alluded to was used to obtain increased campaign contributions for local elected officials [just as the sham and pretext justification for the firing of SLAYTON was found by the Court of Appeals to be a "political" motivation to impress the NRC and government officials that BECHTEL was completely interested in safety and that that was the reason why BECHTEL wanted to carry on its own investigation of

SLAYTON when in reality it carried on its own investigation in order to appease Vealey and to warrant the escalation of the offense that SLAYTON purportedly had committed from a minor violation not involved with safety to one of major proportions warranting good cause for the firing of SLAYTON]. [See Court of Appeals' Opinion, Appendix B, pgs. 25, 26-28.]

This petitioner must in all good conscience quote from the Court of Appeals' opinion in this regard. It is as follows:

> "We must determine if there is substantial evidence to support the jury's verdict which includes an award of punitive damages. ¶ First we evaluate whether there is any solid evidence of pretext so as to support the jury's verdict of wrongful termination based on lack of good cause ..."

Here the Appellate Court in one instance uses the word "substantial" to indicate its responsibility. Then they immediately embark upon finding out whether or not there is any solid evidence of

pretext. Then they state it differently in stating "we evaluate whether any arguable evidence of pretext does not rise above speculation or conjecture so as to support the trial court's judgment notwithstanding the verdict. ..." -- Thus the Appellate Court in California engages in three separate standards in order to reach the decision that it made here in order to overturn the jury verdict and thus apply an unconstitutional standard violating SLAYTON's right to trial by jury in this case in order to reach a fabricated opinion.

The jury in the Pacific West case further found that the public did have an interest in the franchising of public television, and that the defendant's franchising process promoted the provisions of this kind of resource to a greater extent than would be provided in the absence of the process.

In the Pacific West case the United States District Court in its F.Supp. decision states:

> "Once the special verdicts are recorded the court then applies the law to the facts and enters judgment as provided in Federal Rule of Civil Procedure 58. ... Entry of judgment upon a jury's special verdict is subject not only to precedential guidelines but to constitutional constraints as well. ... The Seventh Amendment requires that if there is a view of the case which makes the jury's answers consistent, the court must adopt that view and enter judgment accordingly. ..."

The provisions of California Code of Civil Procedure §629 give the trial court an unfettered and an unbridled right to completely disregard the findings of a jury in any regard and give it the absolute right to be the thirteenth juror that can sway the jury one way or the other. It is submitted that no amount of judicial mental gymnastics can explain how and why this provision does not violate the Seventh Amendment to the United States Constitution.

This writer states this with all due respect to all prior decisions that have been made with reference to this matter but it all boils down to one consistent fact, the trial judge has the absolute right to overrule a jury in a civil case and to absolutely destroy a jury verdict if he or she does not agree with the jury's interpretation of the evidence. This is so unless this Court comes forward and provides sufficient guidelines so as to circumscribe this judicial power to a point where it is as it was originally intended in the Constitution, governed by the constitutional restraints as set forth in the Seventh Amendment to the United States Constitution or that amendment loses its entire effectiveness.

In Sandra Lee Neely, Petitioner, v. Martin K. Eby Construction Co. Inc., 386 U.S. 317, 18 L.Ed.2d 75, 87 S.Ct. 1072, Rehearing Denied 386 U.S. 1027, 18 L.Ed.2d

471, 87 S.Ct. 1366 (1967), after the trial judge had denied the defendant's motion for a directed verdict in a wrongful death action based on the theory of negligence and tried before a jury in the United States District Court for the District of Colorado, the jury awarded the plaintiff a verdict and the trial judge denied the defendant's motion for judgment notwithstanding the verdict or in the alternative for a new trial. On appeal to the Court of Appeals for the Tenth Circuit, the plaintiff urged that the jury's verdict be upheld but she did not request or present grounds for the granting of a new trial in the event that the verdict was not upheld. Contrary to said case, in the case at bar, plaintiff has presented much argument and much evidence from the record urging that the jury's verdict be upheld and has had no chance to request or present grounds for the granting of a new trial

since the trial court granted a new trial in the alternative in the event that the verdict was not upheld. Also in contrast to the Neely case, the Court of Appeals of the State of California has held in Appendix B hereto attached, that it need not go into the question of whether or not the trial court's granting of the motion for new trial in the alternative was proper and correct since it was upholding the judgment notwithstanding the verdict decision of said trial court. Although both parties had argued specifically with reference to the record which pertained to whether or not the trial court had exercised its powers correctly and properly in granting in the alternative said motion for new trial to the defendant employer.

In the Sandra Lee Neely case on appeal to the Court of Appeals for the Tenth Circuit, the plaintiff urged that the jury's verdict be upheld and did not

request or present grounds for the granting of a new trial in the event that it was not. The Court of Appeals held that the evidence of negligence and proximate cause was insufficient to go to the jury and reversed the District Court's judgment with instruction to dismiss the action. On certiorari this United States Supreme Court affirmed the Court of Appeals' actions. In an opinion by Justice White expressing the views of six members of the Court, it was held that the Court of Appeals had the power to direct the dismissal of the action and that because the grant of certiorari in the instant case was limited to the question of the Court of Appeals' power, no consideration could be given to the question whether the evidence of negligence and proximate cause was sufficient to go to the jury.

This case presents to this Court just the question of whether or not this Court

should grant certiorari based upon the usurpation of the power to review in minute detail the evidence that did go to the jury in the case below herein. This is not a question of whether or not the matter should have gone to the jury, it is a question of whether or not the judge has the right to completely review each and every item of evidence that went to the jury in reference to the jury's making of its decision herein. Both the Court of Appeals and the Supreme Court of the State of California have actually gone against their own decisions in this regard. In Hauter v. Zogarts (1975) 14 Cal.3d 104, 110 [120 Cal. Rptr. 781, 74 A.L.R.3d 1282], the California Supreme Court set forth the rules circumscribing the trial court's power to grant defendant's motion for judgment notwithstanding the verdict. It states as follows:

> "The trial judge cannot weigh the evidence [citation], or judge the credibility of witnesses [citation]. If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied [citations]. A motion for judgment notwithstanding the verdict of a jury may be properly granted only if it appears from the evidence, viewed in the light most favorable to the parties securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence or reasonable inferences to be drawn therefrom in support of the verdict the motion should be denied. ..."

What is particularly frustrating to any practitioner is the constant use of the law as set forth in precedential cases to justify the rulings of the Court that are made diametrically opposed to those rulings. After the Supreme Court of any state denies review of an Appellate Court that engages in such conduct the aggrieved party such as the petitioner herein is absolutely stymied. There is no place to go except possibly the United States

Supreme Court and the possibility of review there is minimal.

Here, as is obvious in Appendix B and in the refusal of the Supreme Court of the State of California to review, the Court of Appeals of the State of California has minutely reviewed each and every segment of the evidence presented in this seven and a half week trial the transcript of which was extremely costly [in excess of $12,000.00] and has literally paid no attention to the edict of the Hauter v. Zogarts case, supra. The Court of Appeals obviously considers evidence presented by the defendant as well as that presented by the plaintiff and considers both sides of the evidence in order to reach its conclusion that a political reason for committing bad faith in an employer-employee wrongful discharge situation is okay because that is laudable under "public policy" or "political motivation" under the guise that they are

seeking safety of nuclear power plants -- ludicrous.

It is for the above reason that this petitioner is seeking review of the code section under which this unfettered power to overrule juries is garnered by the judiciary of the state of California. It is a most impactive violation of civil rights to permit this to continue. The rule of the "thirteenth juror" must be circumscribed and the only court that can do it is the United States Supreme Court. If the Constitution does not prohibit an unabridged power under Section 629 of the California Code of Civil Procedure then the Courts of this state will replace juries in civil cases [and to this date they have].

Since in our case the Court of Appeals' decision to refuse to review the question of whether or not defendant was entitled to a new trial because of its decision that judgment notwithstanding the verdict should

be affirmed, we must ask the following adjunctive question. Did it deprive the plaintiff of a review of his right to a new trial in violation of the due process provisions of the United States Constitution [Fifth Amendment]? The adjunctive question to that question is does the Seventh Amendment to the United States Constitution deny to any judge, either state or federal, the power to set aside a jury's verdict without granting a new trial. [See Moran v. Washington Railway and Electric Co. (1931) 49 F.2d 679, 60 App. D.C. 155.]

The Pederson case above cited holds that where a verdict has been rendered for the plaintiff, the Court was without authority on a motion for new trial to render judgment for the verdict on the evidence notwithstanding the verdict. The elimination from this holding of the fact that the motion for judgment

notwithstanding the verdict or in the alternative for new trial had been granted, is of course explained by the early date of this Pederson decision which is in 1913. Had the moving party had legislation and a statute enabling it to make a motion in the alternative as was done in our case, it is still this writer's feeling that the Court would have said, there is no authority for the granting of a motion for judgment notwithstanding the verdict and new trial in the alternative, because to do so is to provide the Court with the vehicle with which to violate the plaintiff's rights to full due process and a jury trial. In this regard I think the following points should be considered:

Let's just visualize what the Court does in this instance. The Court actually states by such a decision wherein it grants both the judgment notwithstanding the verdict and the new trial in the

alternative, that if it has made a mistake or has committed error in granting the judgment notwithstanding the verdict, it then grants the new trial to give the defendant or the losing party the right to again try the case although a prima facie case had been established by the winning party. The Court eliminates from the winning party's arsenal, the right to due process on whether or not it is entitled to have a new trial of its own after the granting of a judgment notwithstanding the verdict. If the Appellate Court affirms as it did in our case, the judgment notwithstanding the verdict decision of the trial court, then the plaintiff has no chance to ask for a new trial although grounds may exist for it to have it because if the evidence was insufficient to sustain a verdict in favor of the plaintiff and against the defendant, then conversely that evidence might have been insufficient to

sustain a verdict in favor of the defendant as against the plaintiff. However, because the plaintiff has had no opportunity to make a motion for new trial because he won the case in the trial court, he cannot argue and cannot make a motion for new trial. In this way the statute is unconstitutional because it deprives the plaintiff of due process. See the Sandra Lee Neely case supra, and especially the dissents of Justices Fortas, Douglas and Black in this regard.

It seems almost obvious that Section 629 of the Code of Civil Procedure is incomplete and therefore unconstitutional. The reason for this is that it does not contain equal protection for both winning and losing parties in a situation involving the facts contemplated by the section. In a case such as ours where the plaintiff has prevailed in a jury trial, and the verdict has been rendered based upon seven and a

half weeks of testimony and evidence which admittedly by the Court of Appeals' opinion shows that there are logical inferences that could be drawn from the evidence under which the jury verdict itself could have been sustained, the trial court granted defendant's motion for judgment notwithstanding the verdict as well as in the alternative granted the defendant's motion for new trial. Plaintiff did not have an opportunity of course to make his own motion for new trial because he had to oppose the defendant's motions and to ask the Appellate Court to sustain the jury's verdict. Thereafter, plaintiff did argue against the granting of said motion for new trial as well as against the granting of judgment notwithstanding the verdict and was told by the Appellate Court that the Appellate Court did not even consider those arguments because of the fact they had affirmed the trial court's granting of the

judgment notwithstanding the verdict. Thus plaintiff had no chance at all to place before the Appellate Courts the question of whether or not he had sufficient grounds to ask for a new trial of his own. The code section does not provide for this contingency although this contingency could easily happen and does happen in most of the cases as it did in this one. The code section provides only in the instance where a directed verdict should have been granted for one party or the other and thus a motion for nonsuit perhaps should have been granted against the plaintiff, the Court has a chance to rectify its mistake after the verdict if it does not agree with the verdict and to set aside the trial by jury that resulted in a verdict for the winning party. There is no provision anywhere for a plaintiff in the situation such as that in which SLAYTON found himself to make a motion for new trial on his own and based

upon the mistakes that were made in the admission of evidence in the case which, if the plaintiff had lost, would have resulted in a basis or ground for the plaintiff's motion for new trial. In this way, the code section is definitely unconstitutional. The question of plaintiff's right to a new trial in the event that the evidence was not sufficient to sustain the trial court's or the Appellate Court's decision to grant judgment notwithstanding the verdict, occupies over half the plaintiff's briefs since the motion was made in the alternative and the Appellate Court did not consider same because of its statement in its opinion that it did not. In this regard then it must be manifest that the plaintiff has had no chance to present and to argue the motion for new trial in the event that judgment notwithstanding the verdict is granted or not granted because

of the peculiar wording of Section 629 of the California Code of Civil Procedure.

The type of jury trial guaranteed by the California Constitution is that which existed at common law, and the Legislature cannot abridge it. [Article 1, Section 16, of the California Constitution.]

In Taylor v. Louisianna (1975) 419 U.S. 522, 95 S.Ct. 692, 698, 42 L.Ed. 690, 698, the United States Supreme Court in deciding whether or not a jury should be a fair cross-section of the community, makes a statement which is most apropos in this case. The statement is as follows:

> "[A] 'fair cross-section of the community' on venires, panels or lists from which trial juries are drawn is a fundamental element of the constitutional right to a jury trial. ... The purpose of a jury is to guard against the exercise of arbitrary power -- to make available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. ... This

> prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large distinctive groups are excluded from the pool. ..."

Obviously the way the California judges are applying Section 629 of the California Code of Civil Procedure in this particular instance is most arbitrary and is against all that this counsel believes the right to jury trial stands for. It must be specifically delineated and set out by this Court in order to circumscribe the arbitrary power that has been taken by the state judiciary in this regard.

This counsel is not being disrespectful. After forty years of practice this counsel is most aware of the dignity that must be accorded to the courts and of this counsel's duty to refrain from any conduct or activity that would reflect upon the absolute dignity and authority of the courts of this land. However this counsel is also mindful of his duty to make

public rights that are guaranteed by the Constitution shine forth to the best of his ability and still maintain his responsibility and duties to both the court and the public. Therefore this Petition for Writ of Certiorari is being presented so that this Court can have the opportunity and the vehicle by which to enforce the constitutional rights as set forth in the Seventh Amendment of the United States Constitution as well as the Fifth and Fourteenth Amendments thereto, all within the four corners of this governing document upon which this country is based.

Justice Black in the Sandra Lee Neely case significantly states as follows in his dissent:

> "Petitioner and respondent both in their briefs on the merits and in their oral argument have vigorously and extensively addressed themselves to the question of whether the lower court was correct in holding that the petitioner's evidence of negligence and proximate cause was

insufficient to go to the jury. [Just as in our case both the trial court and the Court of Appeals after review of the record and evidence felt that the evidence was insufficient to have gone to the jury and that a directed verdict should have been granted as provided in Section 629 of the California Code of Civil Procedure and that this is the reason why the judgment notwithstanding the verdict was granted.] The Court however conveniently avoids facing this issue -- which if resolved in the petitioner's favor would completely dispose of this case -- by a footnote statement that this issue was not presented in the petition for certiorari nor encompassed by our order granting certiorari. [However in the case at bar the Appellate Court conveniently avoids facing this issue by stating that since they have granted the judgment notwithstanding the verdict, the question of new trial and its applicability is moot, and they do not even review the case from that standpoint.] Besides the fact that this seems to me to be an overly meticulous reading of the petition for certiorari and our order granting it, I see no reason for the Court's refusal to deal with an issue which is undoubtedly present in this case even though not specifically emphasized in the petition for certiorari. Although usually this Court will not consider questions not presented in the petition for certiorari,

> our Rule 40(1)(d)(2) has long provided that the Court at its option 'may notice a plain error not presented.' And the Court has frequently disposed of cases by deciding crucial issues which the parties themselves fail to present. See e.g., Brotherhood of Carpenters v. United States, 330 U.S. 395, 91 L.Ed. 973, 67 S.Ct. 775; Silber v. United States, 370 U.S. 717, 8 L.Ed.2d 798, 82 S.Ct. 1287; Boynton v. Virginia, 364 U.S. 454, 5 L.Ed.2d 206, 81 S.Ct. 182. **If, as I believe, the Court of Appeals was wrong in concluding that the evidence was insufficient to go to the jury, then its reversal of the jury's verdict was a violation of the Seventh Amendment and certainly this is the kind of plain constitutional error that this Court can and should correct.**
>
> **That the evidence was more than ample to prove both negligence and proximate cause is, I think, inescapably clear from even a cursory review of the undisputed facts in this record.**"
> [Emphasis, the writer's.]

In short, the Justice felt that for the Court of Appeals to hold on a record that had logical inferences of the plaintiff having sustained its burden in proving negligence and proximate cause [in our case it would have been pretext and sham with

reference to the firing of SLAYTON] it was a clear violation of the Seventh Amendment to deprive petitioner of a jury verdict rendered on that evidence. Justice Black is clear and undoubtedly correct in making the following statement with reference to the plaintiff who was in the same position as is SLAYTON in this case being accorded the opportunity to move for a new trial. He states:

> "We clearly indicated that the result would have been the same had the verdict loser, as had the respondent here, unsuccessfully move for a judgment N.O.V. in the trial court for in that case likewise the verdict winner would have had to wait until the Court of Appeals deprived him of his verdict before presenting his grounds for a new trial. [Just as in our case.] We specifically rejected a suggestion -- today accepted by the Court -- that the verdict winner should have to claim his right to a new trial in the Court of Appeals or lose it. ..." [Emphasis, the writer's.]

The good Justice was referring to the case of Cone v. West Virginia Pulp and

Paper Co., 330 U.S. 212, 91 L.Ed. 849, 67 S.Ct. 752.

CONCLUSION

The California courts have consistently held that if a prima facie case is proved from which logical inferences can be drawn showing other elements of the case, the Court is powerless to grant either motion for non-suit, directed verdict, or judgment notwithstanding the verdict. [Jones v. Hotchkiss, 147 Cal.App.2d 197, 305 P. 2d 129.] In addition to the above-described reasons it is imperative that this Court step in and stop the unbridled substitution of the way a trial court thinks or an Appellate Court thinks for the duly rendered verdict of a jury in a case such as the case at bar. While it is only a statement by the Second District of the Court of Appeal in the State of California in the Jones v. Hotchkiss case it is worthy of repeating same here. At page 134 of the

Pacific 2d citation, presiding Justice Shinn in said case in a concurring opinion states as follows:

> "I concur; but feel impelled to add a thought which comes to mind more often than it is expressed. I put it in the form of questions. Why do defense lawyers press for nonsuits when practically all the material facts are in evidence, instead of submitting the case on the merits, and why do trial judges grant nonsuits in doubtful cases when they are convinced that a verdict in favor of the plaintiff would be against the weight of evidence and that it would be their duty to grant a new trial? It should be clear from a study of the reported cases that the rule applicable to nonsuits operate strongly in favor of plaintiffs and that it precludes reviewing courts from sustaining judgments of nonsuit if the evidence would be legally sufficient to support a verdict or judgment for the plaintiff. However dubious a plaintiff's case may appear to a reviewing court, the functions of the jury must be respected and there can be no weighing of the facts beyond the inquiry whether the case of the plaintiff is entirely devoid of substantial support in the evidence. The frequency with which judgments of nonsuit are reversed should stand as a warning that too many of them are granted. ..."

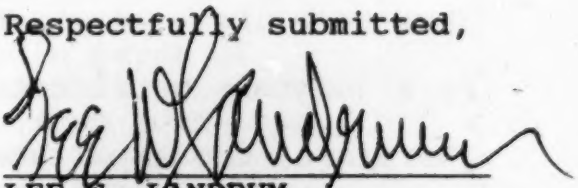
The basis of this petition for writ of certiorari is exactly the sentiment that was discussed by Justice Shinn in the Jones case. In the case at bar the evidence is admittedly overwhelming that there was a "political sham and pretext" which was involved in the reasons why BECHTEL fired SLAYTON, the petitioner herein. Apparently the logical inference that the Appellate Court drew in Appendix B hereto attached is the very reason why that Court reasoned that the jury verdict should be set aside by a judgment notwithstanding the verdict. Therefore, the Appellate Courts in California seem constrained to give lip service to the idea that a person is entitled to an unbridled trial by jury in a civil case under theSeventh Amendment to the United States Constitution and yet they interpret the statute under which they can grant judgment notwithstanding the verdict as being a completely segregated

constitutional reason why the courts can substitute their own interpretation and inferences from the evidence presented so as to reach a decision that is compatible with what the court feels should be the decision the jury notwithstanding.

It is for the reasons herein stated that this petitioner respectfully requests that his Petition for Writ of Certiorari to the United States Supreme Court be granted.

Dated: July 24, 1989

Respectfully submitted,



LEE W. LANDRUM
Attorney for Petitioner
CHARLES N. SLAYTON

[This counsel was admitted to the Supreme Court of the United States Bar by Certificate signed by John F. Davis, Clerk of the Supreme Court of the United States, dated April 7, 1969. Said Certificate is in full force and effect as of this date.]

89-543 (2)

Supreme Court, U.S.
FILED
JUL 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM 1989

CHARLES N. SLAYTON,

Petitioner,

vs.

BECHTEL POWER CORPORATION;
SOUTHERN CALIFORNIA EDISON
COMPANY, A Corporation;
BECHTEL CONSTRUCTION COMPANY,
INC.,

Respondents.

On Appeal from the Supreme Court of the
State of California

APPENDICES TO PETITION FOR WRIT OF CERTIORARI VOLUMES I AND II

LEE W. LANDRUM
Attorney at Law
6994 El Camino Real, Suite 208A
Carlsbad, California 92009
Telephone: (619) 438-6864

Attorney for Petitioner,
Charles N. Slayton

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APPENDIX A

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
4th District, Division 1, No. D006566
S009470

IN THE SUPREME COURT
STATE OF CALIFORNIA

IN BANK

Supreme Court
FILED
MAY 3, 1989
Robert Wandruff Clerk

_____
Deputy

CHARLES N. SLAYTON
v.
BECHTEL POWER CORPORATION et al.
Appellant's petition for review DENIED.

LUCAS

_____
Chief Justice
Received
MAY 5, 1989

Received
FEB 17 1989

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL

FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FILED
Stephen M. Kelly, Clerk
FEB 16 1989
Court of Appeal
Fourth District

CHARLES N. SLAYTON,

Plaintiff and Appellant,

v.

BECHTEL POWER CORPORATION et al.,

Defendants and Respondents.

D006566

(Super. Ct. No. N27595)

APPEAL from a judgment of the Superior Court of San Diego County, Terry B. O'Rourke, Judge. Affirmed.

Charles N. Slayton sued Bechtel Power Corporation for breach of contract and breach of the covenant of good faith and fair dealing and received a $1,052,331 jury verdict which included

$600,000 for punitive damages. He now appeals the trial court's grant of judgment notwithstanding the verdict and order granting a new trial. Because there is no substantial evidence Bechtel wrongfully terminated Slayton so as to support the jury verdict, we affirm the judgment notwithstanding the verdict and need not address the grant of new trial. (**Code Civ. Proc., §629.**)

FACTUAL AND PROCEDURAL BACKGROUND

Bechtel was the general contractor for Southern California Edison Company (Edison), a licensee of the San Onofre nuclear power plant. In the Bechtel management hierarchy pertinent to this case, Edward Molnar was vice president and manager of construction, who supervised project superintendent Dick George, who in turn supervised swing shift superintendent Charles Slayton. Under Slayton were general foreman Charles Cazares, followed by welding foreman William Vealey.

San Onofre Unit One, where the incidents involved in this case occurred, was shut down from February 1982 to November 1984 to upgrade the plant to earthquake standards. The plant was on a return-to-service outage, which meant the construction personnel were working on the plant to complete work required by the Nuclear Regulatory

Commission (NRC) to allow the plant to be relicensed and restarted.

Bechtel's procedures required a welder to mark his "P" number adjacent to a weld after finishing his work.[1] A "P" number is a unique identifier, like a social security number, of a qualified welder and is only issued once. If a welder did not weld for a considerable length of time, he could lose his certification; or if his work did not meet requirements, he could be terminated, retrained, or lose his qualifications. The identification of a welder who had done a particular weld could be traced based on various documents (including a WR6 form, defined below), as well as by the "P" number on the weld. The "P" number notation on the weld was a procedural requirement, used as an inspection device, and the number was painted over after the pipe support[2] was completed, usually about five to seven days after the weld had been accepted through the various levels of inspection. Thus, the "P" number mark on the weld was a temporary, not permanent, record of a welder's identity.

1) Bechtel's written procedure stated: "The welder will place his symbol adjacent to any weld he performs welding operations on. He shall use a vibra-etch, felt marker or paint stick for carbon steel. He shall use a vibra-etch marker for stainless steel."

2) A pipe support (also called a hanger) is a device that holds up the piping on the plant, and its purpose is to hold the piping in place and protect it from having too much movement in the event of an earthquake.

The permanent record of a welder's identity was contained in various written documents, including the WR6 form. A WR6 form is a weld withdrawal form, allowing a welder to obtain the material (i.e. welding rods) to do the welding. When a welder went to the rod room to withdraw welding rod, the rod room attendants used his "P" number to trace his certification to determine he was a qualified welder at the time, and then issued him the appropriate rod. The WR6 form identified the welder, his "P" number, the date, time, what type of rod was withdrawn, and when the rod was returned. The rod room attendants (who, in the incident involved here, were Art Taylor and Al Strikeleather) were also field welding engineers responsible for issuing welding papers, inspecting and approving welds, checking welders' certifications, and making sure everything was done according to procedure.

The term "buying off" a weld refers to the process of accepting or rejecting it by a quality inspector. When a craftsman completed welding on a pipe support, the welding foreman would inspect it. The welding foreman would check to see that the weld was the right size, that it had been cleaned, and that all the paperwork requirements had been met so it could be turned over to the welding engineer for the next step of inspection. The welding engineer would check to see that the welding had been done by a qualified welder, that all the

paperwork was in order, and that the welding met the requirements of the project. After the welding engineer signed off on the weld, if it was a safety related weld, it would go to a quality control inspector, who would in turn sign it off. The process was then complete, and the pipe support could be painted. At each inspection level, the inspector would verify that the welder had put his "P" number adjacent to the weld.

The "P" number incident

On August 5, 1984,[3] Slayton was given a welding package from field welding engineer Taylor consisting of a manila folder with documents in it, and a sticker-type note stating, "Welds O.K. — needs 'P' number." Slayton gave the welding package to general foreman Cazares, and told him to have welding foreman Vealey go to the rod room to determine who had drawn welding rod on that support. Vealey and Cazares went to the rod room, but were unable to find the welding papers. When Cazares told Slayton they could not find the date in the welding room, Slayton ordered a second, more thorough search with the assistance of the rod room attendant. Taylor and Vealey looked through the files again, but were unsuccessful. After the

3) All subsequent references to dates are to the year 1984, unless otherwise indicated.

second search, Slayton requested Vealey inspect the weld and, if the workmanship was compatible with his own, to place his "P" number on it.

Cazares testified that after they could not find the rod papers, he essentially deferred to Vealey's expertise to handle the matter, since he basically left all the welding matters up to Vealey. Vealey told Cazares he could go ahead and "draw rod" so it would validate his "P" number on the support weld. Because Vealey had been a welder for Bechtel for a long time and he knew all about welding, Cazares asked him if he could do that; and Vealey said sure, there was no problem, he had done it before. Vealey falsified the welding rod papers (i.e., the WR6 form) to reflect that he had performed the weld in question. Cazares and the rod room attendants (Taylor and Strikeleather) knew Vealey was falsifying the weld papers, and Strikeleather signed the WR6 form and issued the rod to Vealey. Slayton, however, did not know Vealey had falsified the papers, and he had not told Vealey to do so.[4]

4) Cazares testified he did not know if he told Slayton about Vealey's drawing of the rods, although he usually reported everything to Slayton. According to Vealey, he told both Cazares and Slayton he could draw rods on the pipe support and put his welder's identification number on it even though he did not do the weld. However, Slayton testified he first learned Vealey had falsified the rod documents after Vealey was fired on August 10; he did not order Vealey to falsify the documents; and Vealey did not tell him he was going to falsify them.

On August 6, the weld was inspected and accepted by field welding engineer Strikeleather. The weld was signed off as complete by quality control on August 14.

Vealey's reduction to journeyman and layoff

Since the time of Vealey's promotion to welding foreman in July 1984, Slayton had been dissatisfied with Vealey's performance, complaining that he did not inspect all the welds, nor properly inspect the welds, and he had discussed the matter with Vealey. On August 8, Slayton reduced Vealey from foreman to journeyman after a line rupture occurred in a weld Vealey had failed to inspect. According to Slayton, Vealey threatened that if he was not reinstated as a foreman he would place a complaint in the "NRC drop box" (defined below). Angered by this attempt at blackmail, Slayton put Vealey on the layoff list, and on August 10 Vealey was laid off based on a reduction in force.[5]

5) In contrast, project superintendent George testified he instructed Slayton to reduce Vealey to a journeyman and then lay him off because of Vealey's failure to inspect the weld. Thus, according to George's testimony, Vealey's layoff was not a response to a threat to Slayton.

Vealey's nuclear safety concern

Edison maintained a drop box for employees to submit complaints——called "Nuclear Safety Concern Request for Independent Review," which allowed employees to express any safety concerns about the plant. On August 10, Vealey submitted a nuclear safety concern which described the "P" number incident as follows. When they could not find the rod papers to identify the welder, he jokingly said to his supervisor, "I can draw rod on the pipe support number and even though I won't weld I will then put my welders identification number on it"; nothing more was said at that time. A few hours later he stopped to speak with Slayton, and was told to go ahead with what his supervisor and he had spoken about earlier. Vealey asked Slayton if Slayton knew what he was talking about, and Slayton said it was an opportunity to get an easy completion. Vealey did what he was ordered to do; he went into the rod room and filled out a WR6 for the weld signed by himself for rod he did not weld; turned the rod back in; and then went into containment to put his welder's identification number on the support even though he had not welded. What came to his mind was that the NRC has prosecuted people for falsification of documentation relating to welding; and he did not want this to happen to him, as he was only following orders, and there have been numer-

ous improprieties perpetrated in the name of production.

Exit interview with Vealey

Bechtel's inter-office memorandum, dated August 10, summarized an exit interview with Vealey, conducted by James Voight of Bechtel's quality assurance department, as follows. Vealey stated Slayton is unfamiliar with mechanical specifications since his background is electrical; Slayton had no business running a job outside his discipline; he (Vealey) lost his job because of this lack of knowledge on Slayton's part; he is being made a scapegoat; and the stressing of the pipe was caused by overwelding by the day shift when they thought they discovered some undercut, and it was not caused by Vealey. Vealey commented that the night shift was under pressure and some falsification of documents, initiated at Slayton's direction, was performed to expedite the work. Vealey also requested Richard Reinsch, director of the quality assurance department, call him to discuss other improprieties.

Bechtel's investigation; Slayton's termination; Vealey's rehire; and subsequent events

On August 14, Slayton was relieved of his

duties pending an investigation of Vealey's allegations. An investigation was conducted by Bechtel's quality assurance department, and a report dated September 11 prepared by Reinsch was submitted to Edison, which summarized the investigation and its resolution, including the following items of information. Vealey volunteered (jokingly, according to Vealey) to draw rod and put his identification number on the weld. Slayton admitted he asked Vealey to inspect the weld and if it was acceptable to "adopt" it, but Vealey withdrew the weld rod on his own. On August 17, all swing shift foremen were interviewed to see if there was pressure from supervision that would compromise quality of work or accuracy of records, and none was reported. On August 18, a follow-up interview was conducted with Vealey regarding two other improprieties he had alleged, which after investigation were found to be unsubstantiated. On August 28, the weld papers for the true welder were found, and on August 31, the welding documentation corrected.[6]

6) An inspection report prepared in response to quality assurance instructions to void Vealey's "P" number mark indicates his number was not in fact marked on the weld, but rather the correct "P" number was already there. Vealey testified, however, he did place his number on the weld. Molnar, who made the decision to fire Slayton, testified even if he had known Vealey's "P" number had not actually been placed on the weld, it would not have influenced his decision to fire Slayton.

On August 30,[7] Slayton was terminated for misconduct by Bechtel management, and the NRC was informed of Vealey's allegation and the status of the investigation. On August 31, management met with Vealey to review the results of the investigation of his allegations and to offer him reemployment. On August 31, a training class was held for all field supervisory personnel on the welding documentation procedural violation incident and to reinforce the quality requirements.

At trial, Molnar testified Vealey was rehired because of concerns for his status as a whistleblower; and Slayton was fired because he directed Vealey to place his "P" number on a weld he did not do, in violation of a well-established procedure known to Slayton.

The rod room engineers were not terminated as a result of their knowledge of the incident with Vealey. General foreman Cazares was demoted to a journeyman.

Vealey was laid off for a reduction in force on December 21. When he was laid off, Vealey threatened to go to the NRC, based on his claim he was being laid off in retaliation for his whistleblowing in August. Bechtel made a business decision to resolve the ensuing legal dispute and avoid extended litigation by paying Vealey a cash settlement.

7) An exit interview document dates his termination as August 31.

Slayton's testimony

Slayton testified he knew about the rule which requires the welder who performs welding operations to place his "P" number adjacent to the work he performs. When he read the note from the field welding engineer which stated, "Welds O.K. —needs 'P' number," he interpreted that as meaning the engineer had accepted the weld for quality and he was merely informing Slayton it did not have a "P" number.

Slayton was interviewed by Bechtel manager Molnar, and he read Molnar a written statement in order to respond to Vealey's allegations, which explained the incident as follows:

When the second search for the welding papers proved unfruitful, Slayton considered various reasons why there might not be rod room documentation or a "P" number on the weld, and when seeking the advice of a field engineer, he was told, "No one makes an issue out of 'P' numbers."[8]

8) Specifically, Slayton's statement stated: "I began to rationalize why there was no weld documentation for this support in the rod room. I considered that there are in existence many, many pipe supports which were left in various stages of completion during the 1982/83 outage effort—the actual welding for this support may have completed during that time and there would not be any documentation in the rod room for that phase of work. I considered that there are numerous supports in existence which are being worked on that do not have welder symbols either because of omission by the welder or

Slayton understood that the visible "P" number displayed in the field was primarily a tool used to flag a welder whose weld quality is deficient and who needs quick attention; and welder traceability centered around weld papers, such as WR6 forms, not the "P" number on the pipe support. He rationalized that a welding foreman is a qualified pipe support welder who performs work on a pipe support by inspecting the work performed by the welders, and that the "P" number would be painted over very soon after inspection. Thus, he concluded the welder symbol was not documentation, but merely a convenience which in no way could affect documentation, the audit trail, or the quality of the weld. Further, in this specific case, the weld had already been "bought off" by the welding engineer, since

obliteration due to time. Also, numerous large bore pipe support packages are being passed back and forth between day and night shift. It is not uncommon to have in the order of four to six different welders perform work on a single support. When I examine large bore supports in the field, I don't normally see them 'peppered' with 'P' numbers. With these thoughts passing through my mind, I asked one of the field engineers 'how do we sell supports which were welded on in 1982 & 83, that do not have 'P' numbers?' The reply was 'no one makes an issue out of 'P' numbers.' I did not pursue this response in any further detail at this time, however, the answer that I was given is correct according to procedural weld acceptance criteria in both FC/QCM [Field Construction, Quality Control Manual] 19.21 and GP/QCI [General Procedure, Quality Control Instruction] 202."

the note on the package stated, "Welds O.K. —needs 'P' number."

This was the only case of a missing welder symbol he had encountered to date. There was still a slight procedural question in his mind regarding "generic inspection buy off" of welds without "P" numbers, but for the time being, he concluded the inspector should be accommodated. He had "every intention of resolving this question at the first opportunity." However, there was never the slightest question of quality in his mind when he asked Vealey to go and look at the welding on the pipe support and if he had no problem with the welding—i.e., if the workmanship was compatible with his workmanship—to place his "P" number on it. Slayton emphatically reiterated in his statement that he was totally convinced there had been no quality infractions on his shift caused by himself or any other person functioning with his knowledge.

Slayton testified that after he read Molnar the document, Molnar asked him if he had violated any procedure. Slayton responded he acknowledged the literal intent of the procedure that the welder himself place his symbol adjacent to the work, but the procedure had become vague and unclear due to an evolution of revisions, and the procedure was in need of attention and revision so as to establish the clear intent with respect to welding acceptance and the buy off of welds, without the "P" number be-

ing a requirement for inspection and buy off of welds. Molnar laughed at him.[9] At his deposition, Slayton acknowledged he deviated from the literal intent of the procedure, but at trial insisted he had not violated any procedure.

Slayton testified the field welding engineer who handed him the welding package did not explain precisely what he wanted. He was not sure the inspector wanted the "P" number of the welder who had actually done the welding, and Slayton believed it was not a requirement for acceptance of a weld.[10] He instructed Cazares to have Vealey put his "P" number on the weld in order to accommodate the field welding engineer. He denied he made the request in order to deceive the field engineer.

When he was suspended with pay on August 14, project superintendent George told him he had had a conversation with Molnar and Edison was involved, the matter had become very political, and until it was resolved, it was best to take him off the project.

9) Molnar denied that he laughed at Slayton, other than to make him feel at ease.

10) Slayton's assertion the "P" number notation was not a requirement for acceptance of a weld was premised on the fact that Bechtel's written procedures did not expressly refer to the "P" number notation when delineating the steps required for acceptance of a weld.

Slayton testified that, contrary to the statements in Vealey's nuclear concern request, he did not tell Vealey to go ahead with what his supervisor and he had spoken about earlier, nor did Vealey ask him if he knew what he was talking about.

Molnar's testimony

Molnar was the manager who made the decision to terminate Slayton. He was responsible for seeing that the project was completed on schedule, and he was aware that if it did not meet certain deadlines, penalties would be incurred. Molnar testified the "P" number procedure was a separate requirement from the requirement that the weld have structural integrity, and the safety qualities of a weld did not depend on whether there was a "P" number on it. The weld at issue in this case had appeared satisfactory. However, even if the weld was a structurally good weld, the failure to affix the welder's "P" number raised concerns regarding adherence to procedures.

The "P" number marked on the weld was also part of the weld "documentation," constituting a record of who did the weld, even though it was not permanent documentation. Molnar knew Slayton did not falsify or prepare the WR6 form; and he had no reason to doubt Slayton's position that he did not direct Vealey to do so.

He decided to discharge Slayton because he had instructed an individual to violate a known quality procedure; i.e., he gave instructions to Vealey to put his "P" number on a weld Vealey had not performed. Monlar did **not** fire Slayton based on a belief he had told Vealey to falsify the rod room records.

From Molnar's perspective, Slayton's instruction to Vealey started a chain of events which eventually led to several documents being filled out by inspectors in the inspection process with the wrong "P" number. The purpose of getting the "P" number put on the weld was so the quality people would accept the weld; and it was accepted because Slayton directed Vealey to put his "P" number on it. Instructing Vealey to put his "P" number on something he did not do was telling him to lie about a quality issue.

Slayton, as shift superintendent, had engineers to help him as far as packaging the work and had line organization foremen and general foremen of the various crafts to assist him in performing the work. The shift superintendent should have knowledge of the procedures and an ability to go and get the necessary knowledge for a procedure. It was not absolutely necessary the superintendent know everything about every procedure, since there were a great many procedures. They had a work packaging process which points out which

procedures are necessary, and in implementing them, individuals would need to know them, but he did not expect Slayton specifically or anyone else specifically to have known every nuance of every procedure.

However, regarding the "P" number procedure, he expected Slayton to know it since it was a long-standing and well-known rule the welder would identify his work with his "P" number next to the weld.

Based on an interview with Slayton and a review of some quality assurance department documents, Molnar concluded Slayton obviously understood the procedure regarding the application of the "P" number, and Slayton had directed Vealey to put his "P" number on the weld. During the interview with Molnar, Slayton would not take responsibility for doing anything wrong, rather he tried to explain why his action was not wrong. Molnar terminated Slayton because one, Slayton knew about the procedure and instructed Vealey to violate it; two, Slayton did not acknowledge the fact that a willful breaking of the procedure was wrong, but rather rationalized it was right, which is incompatible with the quality control process which depends on following procedures precisely and the integrity of the individuals involved; and three, Molnar was concerned about what message they would be sending to their employees and the public about

their adherence to the quality program.

Molnar testified no one at Edison or Bechtel told him to fire Slayton,[11] and Vealey never told him to fire Slayton.

Management had a meeting where they discussed how they were going to respond to the concerns raised by Vealey. The meeting did not involve any discussion as to the firing of Slayton. There was no discussion that management wanted to do an investigation before the NRC did an investigation; Bechtel's investigation would have proceeded and if the matter went to the NRC it would have been independent of what Bechtel would have done.[12] Although Molnar did not attend the meeting where Vealey was offered reemployment, Molnar participated in the decision and agreed to the rehire because, after advice from Bechtel's counsel, they were concerned about the whistleblower overtones and he determined it would be in the company's best interests to offer Vealey reemploy-

11) Dwight Nunn, a manager from Edison, corroborated that Edison did not recommend Slayton be fired, although Nunn agreed with the termination action taken by Bechtel.

12) Molnar testified he did not speak with the NRC about Bechtel's investigation; and he did not know, but the NRC may have been informed some other way.

ment.[13] If Vealey had not been a whistleblower, Molnar would not have agreed to rehire him. In evaluating Vealey's situation, Molnar knew he had broken rules, even if he did so under the direction of Slayton; on the other hand, a mitigating factor was the fact he had come forward and admitted his wrongdoing.

Vealey's testimony

When Cazares gave him the pipe support package which stated all welds were good and it needed a welder's identification number, Vealey inspected the weld and found it to be of excellent quality. Vealey testified he thought he was committing a crime by falsifying welding documents, but he did not tell Slayton he thought it was a crime, and he did not tell Cazares because Cazares already knew it was.

When asked if he had made a statement to Bechtel management that if he did not get his job back, he would go to the NRC, Vealey answered

13) Molnar responded, by letter dated September 4, to a letter from Vealey to Steve Bechtel, Jr. (Bechtel's chairman of the board), in which Vealey had complained about Slayton's laying him off and accused Slayton of ordering him to perform contrary to procedures. Molnar's responding letter stated Vealey's letter had been forwarded to him for response; he had met with construction, quality assurance, and project management; and it was his understanding Vealey's concerns had been addressed and resolved.

yes, he had made that statement to the quality assurance personnel, probably Voight and Reinsch. Upon further questioning, Vealey testified that during his exit interview (conducted by Voight) on August 10, he told them he had already put a complaint in the box, and if they did not inspect it, he would go to the NRC.

When shown a document recording the substance of his exit interview, containing his signature, Vealey acknowledged the report did not state that he threatened them with going to the NRC if he did not get his job back. When asked if he wanted to change his testimony, Vealey said no, he talked to the man for over an hour and he told him if his allegations were not investigated in a proper and timely manner, he would go to the NRC if he was not satisfied with their report. When asked if part of being satisfied with their report was for Slayton to be terminated, Vealey answered he never asked them to do that.

Vealey was interviewed by Bechtel quality assurance personnel, Reinsch and Larry Bajada, on August 18.[14] Vealey testified he told Reinsch at the interview he felt they were dragging their feet, and if they did not get moving he would go to the NRC. Also during that interview, Reinsch asked Vealey

14) Reinsch's report to Edison indicated Vealey was interviewed on August 18 by Bechtel qualilty assurance. Vealey testified he spoke with Reinsch around August 20, but before August 31.

whether or not he wanted Slayton's job, and Vealey answered no, it didn't pay enough. Vealey testified Reinsch's question was just a rhetorical question, Reinsch was not serious, and he and Reinsch are friends.

Sometime in August, Vealey did file a complaint with the NRC representatives who had an office on-site at the power plant, telling them he would feel much better if they were looking over Edison's and Bechtel's shoulder while his complaint was being investigated because otherwise he felt it would be whitewashed. Based on his phone conversation with the NRC representative, he knew Bechtel employees were informed of his complaint to the NRC, but he did not know if the NRC ever indicated it wanted to do its own investigation or would leave the investigation to Bechtel.

At a meeting on August 31 with Bechtel management, Vealey was informed of the results of the investigation of his nuclear safety concerns, was told Slayton had been terminated, and he was eligible for rehire. At another point in his testimony, after having his memory refreshed with his deposition testimony, Vealey stated he was not told at the August 31 meeting Slayton had been terminated, but was told "sometime in that time" period Slayton had been terminated. Vealey considered his August rehiring to be a deal—i.e., he was rehired and he was not to be discriminated against for his

past action of whistleblowing regarding the "P" number incident with Slayton.

Reinsch's testimony

Reinsch, whose father was a vice-chairman of Bechtel, was responsible for the quality assurance program at the plant, over which program he had hiring power, but he had no power to hire for Slayton's position. Reinsch testified he never offered Slayton's position to Vealey, and he had no authority to do so.

The quality assurance department was an "independent" department in the sense it was directed out of the Los Angeles division office rather than from the job site, so it was independent from any of the management at the site.

When Vealey's nuclear safety concern was placed in the drop box, his department commenced an investigation, and later Edison was also notified of the concern, and Edison's quality assurance department directed Reinsch to conduct an investigation. Specifically, Edison referred to a problem of "potential falsification of records" in the concern. Reinsch, corroborated by Edison's representative Nunn, testified the falsification of records issue pertained to anything related to the installation and inspection of the quality of the work—thus, it included the identification of the welder on the weld

as well as the preparation of the weld papers.

Quality assurance's investigation and report was not concerned with the issue of whether Slayton should be fired, but rather addressed how to ensure compliance with the procedural violations, and Reinsch made no recommendations about what should be done with Slayton. Reinsch was told by Bechtel manager Homer McCluskey to call Vealey and have him attend the August 31 meeting, during which they would summarize the results of the investigation and let him know he was eligible for rehire. At an earlier meeting, Reinsch and representatives of Edison had met with the NRC inspectors and informed them of the nuclear safety complaint, and the NRC representative had expressed concern about the employment security of people who point out nuclear safety problems. Reinsch asserted to the NRC inspector the employee was a participant in the procedural violations, and if it was up to him he felt he should not be reemployed, but the NRC inspector responded it was paramount to protect people who make nuclear safety concerns.

George's testimony

Project superintendent George, Slayton's direct supervisor, testified Molnar called him and told him that because there was a quality concern, he

wanted to send Slayton home with pay pending investigation of the matter, and George relayed the instruction to Slayton.

According to George, rod room attendant Strikeleather should not have issued the rod to Vealey if he knew Vealey was not going to do the weld, and his doing so would be in violation of procedures and misconduct.

If a welding engineer indicates a weld is okay but needs a "P" number, it could indicate the engineer had not continued with the inspection, and had not checked the quality of the weld. A note saying a weld is okay does not mean anything since the inspector has to sign his name to a document, and the inspection has to be closed out, including checking to see that the welder was qualified and certified to weld at that time. Thus, the note merely means the "P" number had to be on the weld before the inspection process could continue. However, the absence of the welder's symbol does not affect the physical quality or safety of the weld.

According to George, Slayton could have entered a note in the night shift log that they were unable to find the weld papers or unable to find who did the welding, and left it for the next shift to investigate. If they could not discover who performed the work, the appropriate procedure was to write a "nonconforming report" which would go to the quality control department and the engineer would

determine what corrective action to take.

Under no circumstances should someone who did not do the welding put their "P" number next to the weld. It was a violation of procedure for a superintendent to direct or authorize a welding foreman to put his "P" number adjacent to a weld he had not welded. When asked if it was a violation of procedure for a welding superintendent to request the welding foreman to put his "P" number on a weld he had not done, if he would have physically approved the weld, George testified it was hard to answer yes or no; but, yes, it would be against the procedure to authorize a welder to put his "P" number if he had not welded it; the superintendent had no authority to revise or alter any of the procedures, although he could have requested engineering to alter the procedure. That is, the supervisors must follow the procedures as they are written, and may not read between the lines; if they are in a position where they need to expound upon what is in the written procedure, they go to engineering and ask them to make the decision.

Cazares's testimony

General foreman Cazares had had conversations with Slayton about Vealey's job performance, and Cazares had warned Vealey that Slayton sooner or later was going to replace him or put him

back. Prior to Vealey's layoff by Slayton in August, at a social occasion Vealey told Cazares he knew how to make the powers at San Onofre toe the line, he had sued them once and after they found out what he knew, they gave him a truck or the equivalent of a truck in money.[15]

Maisu's testimony

Annette Maisu was an assistant field contsruction engineer for Bechtel, who was assigned to investigate and provide a response to a corrective action report (C.A.R.) regarding the "P" number incident. A C.A.R. is a document issued by quality assurance that documents an irregularity requiring an answer from the engineering department. She obtained background information from the quality assurance personnel, interviewed the employees,

15) Vealey denied he had been given a truck or anything else of value. The receipt of the truck issue apparently arose in the context of Vealey's termination and subsequent reinstatement in 1978. Vealey was terminated for destroying company property, which he purportedly did out of anger at his not being chosen for a foreman position. Although his termination notice stated he was not reeligible for rehire for the length of the project, he was rehired earlier since, according to Bechtel management, the union was having trouble supplying the needed quantity of workers, and thus terminated employees were given amnesty. Vealey had filed a grievance regarding his 1978 termination, but he denied he was given back pay or a truck as a result.

and went into the containment building to see the weld. She gave her response to Steve Boesel, project field engineer, who was acting as her supervisor on the matter.

Her response concluded the absence of a "P" number was not a major significant safety violation, it was a matter of minor concern, and would be so addressed.[16] Boesel reviewed her response and took it away from her. Following the submission of her response, a different response was prepared by Boesel with her input, since they had to "get a response that was acceptable." The second response was much shorter and said words to the effect that the procedural problem would be corrected. Boesel omitted Maisu's statement that the absence of a "P" number was not a major safety violation. Maisu felt they were intimidated about the problem with Slayton.

She later unsuccessfully sought to obtain a copy of her original response on two occasions—

16) Maisu testified the weld in question was not a safety significant weld. Although it was located in the containment building, and thus by definition was a safety related weld, in actual use it was a non-safety weld since it was on a stairwell outside of the containment.

According to Molnar and George, the weld involved in the incident was a safety related weld, which meant it was associated with a pipe support that had been designated as critical or important to the safe operation of the plant, particularly during an emergency when the plant must be shut down without danger of radiation to the public.

she looked in Boesel's office and asked him for a copy; and she went to the building where the project was centered and was told if she set foot in the building again she would be terminated.

ANALYSIS

On appeal, Bechtel does not dispute there is sufficient evidence to support a jury finding there was an agreement that Slayton, an employee with a long and largely satisfactory work history and on a career track with Bechtel, would not be terminated except for good cause.

Liability for wrongful termination of an "at will" employee arises when there is an express or implied promise of permanent employment and to terminate only for good cause, and the employee is discharged without good cause. (**Foley v. Interactive Data Corp.** (1988) 47 Cal.3d 654, 700.)[17]

The plaintiff may establish wrongful termination by showing the employer's stated reason for the termination was merely a pretext for a firing based on other, improper motives. (See **Crosier v.**

17) An "at will" employee is one whose employment is for an indeterminate term. (**Foley v. Interactive Data Corp.**, **supra**, 47 Cal.3d at p. 665.)

United Parcel Service, Inc. (1983) 150 Cal.App.3d 1132, 1138-1139.)[18]

In determining what constitutes good cause for the termination of at will employees, the courts have cautioned that care must be taken not to interfere with the legitimate exercise of managerial discretion. (**Pugh v. See's Candies, Inc.** (1981) 116 Cal.App.3d 311, 330; **Crosier v. United Parcel Service, Inc., supra**, 150 Cal.App.3d at pp. 1139-1140; **Clutterham v. Coachmen Industries, Inc.** (1985) 169 Cal.App.3d 1223, 1227.) Regarding managerial employees, "good cause" has been interpreted as allowing the employer substantial scope for the exercise of subjective judgment. (**Pugh v. See's Candies, Inc., supra**, 116 Cal.App.3d at p. 330.)

18) The recent California Supreme Court decision, **Foley v. Interactive Data Corp., supra**, 47 Cal.3d at page 682 eliminates liability for termination premised on tortious breach of the implied covenant of good faith and fair dealing, while allowing liability based on breach of contract. Although the existence of "pretext" has been used by the appellate courts to establish tort liability, pretext is also relevant to breach of contract liability, since evidence of pretext could establish lack of good cause. The **Foley** decision, rendered after the trial in this case, expressly declines to decide its retroactivity. (**Id.** at p. 700, fn. 43.) As we explain below, our analysis of the record uncovers no substantial evidence of pretext so as to undermine the evidence of good cause. Since we affirm the judgment notwithstanding the verdict, we need not reach the issue of **Foley**'s retroactivity.

In granting a judgment notwithstanding the verdict, the trial court cannot weigh the evidence or judge the credibility of witnesses; and it, as well as this court on appeal, must view the evidence and draw all reasonable inferences in favor of the jury's verdict. (**Hauter v. Zogarts** (1975) 14 Cal.3d 104, 110-111.) If there is any substantial evidence in support of the jury's verdict, the motion for judgment notwithstanding the verdict must be denied. (**Ibid.**) We must determine if there is substantial evidence to support the jury's verdict, which includes an award of punitive damages.

First, we evaluate whether there is any solid evidence of pretext so as to support the jury's verdict of wrongful termination based on lack of good cause. Stated differently, we evaluate whether any arguable evidence of pretext does not rise above speculation or conjecture, so as to support the trial court's judgment notwithstanding the verdict.

In his brief on appeal, Slayton primarily focuses on an argument Bechtel fired him based on a charge he falsified records, knowing in fact it was Vealey, not he, who falsified the rod room documents. The record refutes this argument. Once the investigation of the incident began, Bechtel was informed of Slayton's position that, contrary to the suggestion in Vealey's nuclear safety concern, Slayton only authorized Vealey to place his "P" number on the weld, and he was ot involved in the

WR6 form falsification.[19] Although Bechtel may have broadly interpreted Slayton's request that Vealey place his "P" number on the weld as constituting an act of "falsification of documents," the record does not indicate Bechtel was accusing Slayton of directing Vealey to falsify the WR6 form. We reject Slayton's argument of pretext in this regard.

Slayton also argues Vealey had some kind of power over Bechtel, and Bechtel fired Slayton to appease Vealey, not because Slayton's conduct warranted termination. With this argument in mind, and resolving all conflicts and drawing all inferences in favor of the jury's verdict, we summarize the evidentiary items which could be construed as relevant to the pretext issue.

Cazares had warned Vealey that Slayton might fire him for poor job performance. Vealey had told Cazares he knew how to make the powers at San

19) John Sneeringer of the quality assurance department interviewed Slayton on August 15 and documented Slayton's position that Vealey falsified the rod papers without Slayton's knowledge or direction. Molnar met with Sneeringer regarding his interview with Slayton and also personally interviewed Slayton and heard his explanation. We note various quality assurance documents generated during the course of the investigation refer generally to the fact that the welder falsified documents, without stating whether or not Slayton directed the falsification. However, these latter documents do not indicate Slayton ordered anything other than marking the "P" number on the weld, nor were they used to accuse Slayton of directing the falsification of the WR6 form.

Onofre toe the line—i.e. he had sued them and once they found out what he knew, he got a truck (or money) out of the deal. Vealey originated the idea to falsify the WR6 form. Slayton was not informed of Vealey's falsification of the WR6 form, and Vealey lied in his nuclear safety concern when he wrote it in a manner to suggest Slayton knew about the entire scheme. At his exit interview, Vealey indicated Slayton was not qualified to supervise welding, and he threatened to go to the NRC if he was not rehired. Project superintendent George told Slayton the matter was political, and it was best he be suspended until the whole thing blew over. During a second interview with quality assurance, Vealey again threatened to go to the NRC, and Reinsch asked Vealey if he wanted Slayton's job. The engineering department (based on Maisu's original report) perceived the "P" number incident as of minor significance, but was intimidated into writing a report which did not reflect that conclusion. No one else involved in and knowledgeable of the incident at the time it occurred (i.e. the rod room engineers, general foreman Cazares, Vealey) were terminated.

Regarding the role of Vealey in the incident, the evidence can reasonably support an inference Vealey wanted Slayton fired and "set him up" to commit the procedural violation: (1) because Vealey knew Slayton was dissatisfied with his job performance and might fire him; and (2) because

Vealey did not feel Slayton was qualified to oversee welding operations.

However, we are unable to draw the necessary inference Vealey was in a position of being able to influence Bechtel management to fire Slayton for reasons independent of Slayton's own misconduct. Vealey's testimony indicates he made a threat to go to the NRC on August 10 to Voight of quality assurance, and again on August 18 to Reinsch of quality assurance. The jury could have inferred that because Vealey threatened to go to the NRC if he was not rehired and/or if he was not satisfied with the investigation, he also threatened to go to the NRC if Salyton was not fired. Nevertheless, the fact the NRC was in fact apprised of Vealey's complaints on August 30, at a meeting with Reinsch and Edison representatives, on its face undermines the reasonableness of an inference Bechtel management was motivated to fire Slayton to keep the NRC uninformed.

Further, even if we draw the inference Molnar knew Vealey had made a threat to go to the NRC if Slayton was not fired, and did not know the NRC was to be informed in any event,[20] we are still un-

20) Apparently neither Reinsch nor Molnar were asked if they knew Vealey had made the NRC threat. Nevertheless, the jury could have credited Vealey's testimony he made the statement to Voight and Reinsch. Both Reinsch and Molnar testified they did not communicate with each other about the investigation and decision to terminate Slayton. Their testi-

able to find evidence which suggests Molnar, or anyone else in management, did not want the NRC to know about the safety complaints. Although it is not unreasonable to assume, based on the inherent nature of business, that Bechtel might have wanted to conduct its own investigation and take appropriate action (i.e. fire the employee responsible for the violation), so as to avoid an independent investigation by the NRC, this motivation cannot be characterized as wrongful. That is, it was legitimate for Bechtel to terminate the employee responsible for the misconduct, regardless of whether it was motivated by an independent concern for safety, or motivated by a desire to satisfy the NRC and avoid any delay or other negative ramifications which might arise from an NRC investigation.

mony indicates, however, that they both had discussions about Vealey's complaints with McCluskey, who was Bechtel's project manager responsible for overall management and for communication between Bechtel and Edison. Thus, arguably an inference could be drawn that Molnar, via McCluskey, was told about Vealey's NRC threat to Reinsch. The record indicates Molnar knew Vealey believed Slayton was not qualified for his job, since Molnar reviewed the document summarizing Vealey's exit interview with quality assurance, where Vealey made that assertion. Molnar testified he decided to terminate Slayton on August 28. The meeting with the NRC was not held until August 30, and Molnar testified he did not know if the NRC knew about Bechtel's investigation. Thus, an inference could be drawn that Molnar knew Vealey wanted Slayton fired, and knew Vealey was threatening to go to the NRC, but did not know the NRC was informed of the complaints.

We cannot assume Bechtel wanted to hide the complaint from the NRC, absent some evidentiary facts pointing in that direction. Slayton has not provided us, nor has our review of the record revealed, any such evidence. Indeed, the only evidence points in the opposite direction; i.e. Bechtel and Edison met with and informed the NRC about the complaint and the result of the investigation. Slayton did not call the NRC representatives as witnesses to refute this testimony, and there is nothing in the record which undermines its veracity. Since no evidence points to a cover-up of safety violations when Bechtel was conducting its investigation, and since Bechtel informed the NRC of the complaints after the investigation, the inference cannot be drawn Bechtel fired Slayton to accommodate Vealey so he would not complain to the NRC.

An argument could be made that Bechtel decided to appease Vealey by firing Slayton as a preventative measure—i.e., to satisfy Vealey so he would not pressure the NRC to conduct its own independent investigation of his safety concerns rather than relying on Bechtel's investigation, or so he would not alert the NRC of other safety concerns that might have existed. However, we can find no evidence in the record to support an inference Bechtel believed Vealey had a basis to make such assertions. Indeed, when Vealey was laid off in De-

cember, there is no evidence he raised additional safety concerns, or complaints about inadequate earlier investigations, as a way to force Bechtel to reemploy him; rather he merely asserted his whistleblower status attained in August 1984 via the "P" number incident.

A glimmer of evidence can be extrapolated from Reinsch's question to Vealey if he wanted Slayton's job. Reinsch's testimony shows that he, as quality assurance engineer, to some extent participated in discussions with Bechtel management, Edison, and the NRC regarding the incident. An inference could be drawn that Reinsch was questioning Vealey in order to determine what it would take to satisfy Vealey. However, as we have stated, the record does not show Bechtel management had any motive to silence Vealey as to his safety concerns; to the contrary, the NRC was informed about his complaints. In the absence of evidence suggesting Bechtel wanted the NRC kept uninformed, the single evidentiary item of Reinsch's question as to whether he wanted Slayton's job is not enough to support an inference of Bechtel's motive to silence or appease Vealey.

Also too attenuated is the inference Slayton argues should be drawn from Vealey's statement he received a truck or money from Bechtel, and made them "toe the line" when they found out "what he knew." This statement apparently referred to his re-

hiring after his termination in 1978 (see fn. 15, **ante**). It is too speculative to infer that because Vealey may have succeeded in pressuring Bechtel in 1978, he maintained some kind of influence over them in 1984, when there is no other evidence to support that inference.

Regarding the merits of the decision to terminate Slayton, the record can support an inference that from an engineering/safety perspective his procedural violation was a minor one, but Bechtel management wanted this conclusion suppressed so that it could not be used to challenge Slayton's termination, since it needed to fire someone for "political" reasons (i.e., based on Maisu's testimony plus George's statement the matter was political). That is, Bechtel could have wanted to make a showing to Edison and/or the NRC that it was strict on safety so as to avoid further investigations and interference with its operations. The inference could be drawn that if not for political pressure to have a safe nuclear power plant, Bechtel would not have felt the need to issue the drastic sanction of termination for what could be perceived as a minor procedural violation.

However, this type of "political" motivation cannot be characterized as wrongful. The motivation to fire an employee because of pressure to respond to an incident that affects nuclear safety is valid; it is not a wrongful "political" motivation in the sense of

an act arising from motivations such as favoritism, or power or personality conflicts. Thus, as we discussed above, even if Bechtel management really fired Slayton because it was under pressure from Edison and the NRC to strictly implement its quality control program, and not because Bechtel on its own was stringently concerned about safety, this is not the kind of "pretext" which constitutes wrongful termination, if in fact safety concerns were present. It was legitimate for management to reject a report which characterized a violation as minor, when the policy was to require strict adherence to all quality control procedures, and deviation therefrom could therefore ot be considered a minor matter.

Further, although Slayton was the only employee fired of all those involved in the wrongdoing, he cannot be characterized as having been unfairly made a "scapegoat," since he was at the top of the management hierarchy (i.e. above Cazares and Vealey) who authorized the violation of the "P" number procedure. Even though the rod room engineers were also responsible for inspection and they wrongfully issued the rod and approved the weld, they nevertheless were not the source of the authorization. Finally, even if Vealey planted the idea in his head, Slayton made a conscious choice to bend the rules.

Having concluded there is no substantial evidence of pretext, we see no inferences in the record

to undermine the evidence of good cause. The record indisputably shows management had a legitimate reason for terminating Slayton based on his admitted act of authorizing a welder to place his "P" number on a weld he did not perform. The "P" number notation was used as an inspection device to maintain the quality of welding by holding the welder who did the actual work accountable, thereby allowing identification of welders whose work was inadequate. The purpose of the "P" number procedure was thwarted by placing a mark of another welder, especially when the original weld papers could not be found, since such an act interferred with accurate identification of the welder who did the work. Even if the violation was minor in terms of its actual effect on safety, the evidence does not suggest management acted unreasonably in determining strict adherence to all quality control procedures was required, especially in the context of a nuclear power plant, and violation of a long-standing and well-known procedure warranted termination. Under these circumstances, the jury cannot interfere with the exercise of legitimate employer judgment.

Slayton points to the incongruity between Bechtel's act of firing him, with its act of rehiring Vealey, the latter who indisputably engaged in deceitful conduct. Although the result (justified by Vealey's whistleblower status) seems unfair, it does

not establish legal liability for Slayton's termination. Bechtel had legitimate reasons to terminate both Slayton and Vealey; the fact that for other reasons (whistleblower concerns) it made a decision not to terminate Vealey, does not eliminate the good cause for Slayton's termination.

Finally, we can draw no inferences of breach of contract based on Molnar's testimony suggesting the possibility he might not have fired Slayton if Slayton had admitted his wrongdoing rather than seeking to justify the violation. As we have stated, it was not unreasonable for management to require strict adherence to procedure in the context of nuclear safety, and thus an assessment the employee did not understand the importance of this strict adherence established good cause for termination.

Given our holding that the trial court properly entered a judgment in favor of Bechtel notwithstanding the jury verdict, we need not address its granting of the new trial motion.

DISPOSITION

The judgment notwithstanding the verdict is affirmed.

WORK, Acting P.J.

WE CONCUR:

HUFFMAN, J.

FROEHLICH, J.

APPENDIX C

AMENDMENT VII
UNITED STATES CONSTITUTION

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

APPENDIX D

CALIFORNIA CODE OF CIVIL PROCEDURE
Section 629

§629. Judgment Notwithstanding Verdict.

The Court, before the expiration of its power to rule on a motion for a new trial, either of its own motion after five days' notice, or on motion of a party against whom a verdict has been rendered, shall render judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made.

A motion for judgment notwithstanding the verdict shall be made within the period specified by

§659 of this code in respect of the filing and serving of notice of intention to move for a new trial. The making of a motion for judgment notwithstanding the verdict shall not extend the time within which a party may file and serve notice of intention to move for a new trial. The court shall not rule upon the motion for judgment notwithstanding the verdict until the expiration of the time within which a motion for a new trial must be served and filed, and if a motion for a new trial has been filed with the court by the aggrieved party, the court shall rule upon both motions at the same time. The power of the court to rule on a motion for judgment notwithstanding the verdict shall not extend beyond the last date upon which it has the power to rule on a motion for a new trial. If a motion for judgment notwithstanding the verdict is not determined before such date, the effect shall be a denial of such motion without further order of the court.

If the motion for judgment notwithstanding the verdict be denied and if a new trial be denied, the appellate court shall, when it appears that the motion for judgment notwithstanding the verdict should have been granted, order judgment to be so entered on appeal from the judgment or from the order denying the motion for judgment notwithstanding the verdict.

Where a new trial is granted to the party moving for judgment notwithstanding the verdict, and the

motion for judgment notwithstanding the verdict is denied, the order denying the motion for judgment notwithstanding the verdict shall nevertheless be reviewable on appeal from said order by the aggrieved party. If the court grants the motion for judgment notwithstanding the verdict or of its own motion directs the entry of judgment notwithstanding the verdict and likewise grants the motion for a new trial, the order granting the new trial shall be effective only if, on appeal, the judgment notwithstanding the verdict is reversed, and the order granting a new trial is not appealed from or, if appealed from, is affirmed. Leg.H. 1923 p. 750, 1935 ch. 722, 1937 ch. 551, 1951 ch. 801, effective January 1, 1952, 1961 ch. 604, 1963 ch. 205.

Ref.: Cal. Fms Pl. & Pr., "Assault and Battery," "Judgments," "Motions After Trial"; W. Cal. Pro., "Trial" §§159, 160, 440, 441.

APPENDIX E

CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 659

§659. Notice of Motion—Filing and Service, Time—Contents—Extension of Time.

The party intending to move for a new trial must file with the clerk and serve upon each adverse party a notice of intention to move for a new trial, designating the grounds upon which the motion will be made and whether the same will be made upon affidavits or the minutes of the court or both, either

1. Before the entry of judgment; or

2. Within 15 days of the date of mailing notice of entry of judgment by the clerk of the court pursuant to §664.5, or service upon him by any party of written notice of entry of judgment, or within 180 days after the entry of judgment, whichever is earliest; provided, that upon the filing of the first notice of intention to move for a new trial by a party, each other party shall have 15 days after the service of such notice upon him to file and serve a notice of intention to move for a new trial.

Said notice of intention to move for a new trial shall be deemed to be a motion for a new trial on all the grounds stated in the notice. The time above

specified shall not be extended by order or stipulation or by those provisions of §1013 of this code which extend the time for exercising a right or doing an act where service is by mail. Leg.H. 1872, 1874 p. 315, 1907 p. 717, 1915 p. 201, 1929 p. 841, 1951 ch. 801, 1959 ch. 469, 1961 ch. 604, 1965 ch. 1890, 1967 ch. 169, 1970 ch. 621.

Ref.: Cal. Fms Pl. & Pr., "Accounting, Action for," "assault and Battery," "Motions After Trial," "Reference," "Reformation of Instruments," "Rescission and Restitution"; W. Cal. Pro., "Courts" §249.

APPENDIX F

AMENDMENT V
UNITED STATES CONSTITUTION

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

APPENDIX G

AMENDMENT XIV
UNITED STATES CONSTITUTION

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the

proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions

of this article. (Note: Section 1. has been changed by section 1. of the twenty-sixth amendment prohibiting the right of citizens who are eighteen years of age or older to be denied or abridged on account of age.)"

APPENDIX H

Foley v. Interactive Data
(1988) 47 Cal.3d 654
254 Cal.Rptr. 211

APPENDIX I

CALIFORNIA CODE OF CIVIL PROCEDURE
Section 630

§630. Directed Verdict.

(a) Unless the court specified an earlier time for making a motion for directed verdict, after all parties have completed the presentation of all of their evidence in a trial by jury, any party may, without waiving his or her right to trial by jury in the event the motion is not granted, move from an order directing entry of a verdict in its favor.

(b) If it appears that the evidence presented supports the granting of the motion as to some, but not all, of the issues involved in the action, the court shall grant the motion as to those issues and the ac-

tion shall proceed on any remaining issues. Despite the granting of such a motion, no final judgment shall be entered prior to the termination of the action, but the final judgment, in addition to any matter determined in the trial, shall reflect the verdict ordered by the court as determined by the motion for directed verdict.

(c) If the motion is granted, unless the court in its order directing entry of the verdict specifies otherwise, it shall operate as an adjudication upon the merits.

(d) In actions which arise out of an injury to a person or property, when a motion for directed verdict was granted on the basis that a defendant was without fault, no other defendant during trial, over plaintiff's objection, shall attempt to attribute fault to or comment on the absence or involvement of the defendant who was granted the motion.

(e) The order of the court granting the motion for directed verdict is effective without any assent of the jury.

(f) When the jury for any reason has been discharged without having rendered a verdict, the court on its own motion or upon motion of a party, notice of which was given within 10 days after discharge of the jury, may order judgment to be entered in favor of a party whenever a motion for directed verdict for that party should have been granted had a previous motion been made. Except

as otherwise provided in §12a, the power of the court to act under the provisions of this section shall expire 30 days after the day upon which the jury was discharged, and if judgment has not been ordered within that time the effect shall be the denial of any motion for judgment without further order of the court. Leg.H. 1947 ch. 984, 1967 ch. 625, 1986 ch. 540.

Ref.: W. Cal. Pro., "Trial';' §408.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 9016 Mission Boulevard, Riverside, California 92509.

On September , 1989, I served the within APPENDICES TO PETITION FOR WRIT OF CERTIORARI VOLUMES I AND II on the interested parties in said action, by placing a true copy in each of two (2) sealed evelopes, with postage thereon fully prepaid, in the United States mail at San Bernardino, California, addressed as follows:

Walter A. Stringfellow
Donald A. Newman
Thelen, Marrin, Johnson & Bridges
333 South Grand Avenue
Suite 3400
Los Angeles, CA 90071

Attorney General
For the State of California
110 West A Street
Suite 700
San Diego, CA 92101

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on September , 1989, at Riverside, California.

JACK GALLAGHER

Supreme Court, U.S.
FILED
OCT 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 89-543

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

CHARLES N. SLAYTON,

Plaintiff-Petitioner,

vs.

BECHTEL POWER CORPORATION; SOUTHERN CALIFORNIA EDISON COMPANY, A Corporation; BECHTEL CONSTRUCTION COMPANY, INC.,

Defendants-Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

DONALD A. NEWMAN, ESQ.
THELEN, MARRIN, JOHNSON & BRIDGES
333 South Grand Avenue, Suite 3400
Los Angeles, California 90071
(213) 621-9800
Attorneys for Defendants-Respondents
BECHTEL POWER CORPORATION and
BECHTEL CONSTRUCTION, INC.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

STATEMENT OF THE CASE

In a decision filed on February 16, 1989, the Court of Appeal for the Fourth Appellate District, Division One, of the State of California affirmed the judgment notwithstanding the verdict in favor of Bechtel of the Superior Court of San Diego County, State of California, Terry B. O'Rourke, Judge.

In reaching its decision, the Court of Appeal applied the standard of review prescribed under California law in appeals from a judgment notwithstanding the verdict. It noted:

> In granting a judgment notwithstanding the verdict, the trial court cannot weigh the evidence or judge the credibility of witnesses;

and it, as well as this court on appeal, must view the evidence and draw all reasonable inferences in favor of the jury's verdict. (Hauter v. Zogart's (1975) 14 Cal.3d 104, 110-111.) If there is any substantial evidence in support of the jury's verdict, the motion for judgment notwithstanding the verdict must be denied. (Ibid.) We must determine if there is substantial evidence to support the jury's verdict, which includes an award of punitive damages.

See Appendices to Petition for Writ

of Certiorari, page 32.

In scrupulously applying this standard to the evidence, the Court of Appeal first proceeded to evaluate whether there was any substantial evidence of pretext to support the jury's verdict of wrongful termination based on lack of good cause. The Court of Appeal carefully addressed each of the arguments advanced by Slayton, the appellant, in his brief. The appellate court observed that Slayton primarily focused on an argument that Bechtel had fired him based on a charge he had falsified records, knowing in fact it was Vealey, not he, who had falsified the pertinent documents. The Court of Appeal noted that "[t]he record refutes this argument." See

Appendices, page 32. The appellate court rejected Slayton's argument of pretext in this regard.

The Court of Appeal also considered Slayton's argument that Vealey had some kind of power over Bechtel and that Bechtel had fired Slayton to appease Vealey rather than because Slayton's conduct had warranted termination. See Appendices, page 33. After carefully reviewing all the evidence which could have been construed as relevant to this issue, and resolving all conflicts and drawing all inferences in favor of the jury's verdict, the appellate court concluded that it was unable to draw the necessary inference that Vealey was in a position of being able to influence

Bechtel management to fire Slayton for reasons independent of Slayton's own misconduct. See Appendices, page 35.

After noting that "[t]he inference could be drawn that if not for political pressure to have a safe nuclear power plant, Bechtel would not have felt the need to issue the drastic sanction of termination for what could be perceived as a minor procedural violation", the Court of Appeal stated that "this type of 'political' motivation cannot be characterized as wrongful. The motivation to fire an employee because of pressure to respond to an incident that affects nuclear safety is valid; it is not a wrongful "political" motivation in the sense

of an act arising from motivations such as favoritism, or power or personality conflicts." The appellate court further concluded that "[i]t was legitimate for management to reject a report which characterized a violation as minor, when the policy was to require strict adherence to all quality control procedures, and deviation therefrom could therefore not be considered a minor matter." See appendices page 39-40.

The Court of Appeal, after concluding that there was no substantial evidence of pretext, saw no inferences in the record to undermine the evidence of good cause. It stated:

The record indisputably

> shows management had a legitimate reason for terminating Slayton based on his admitted act of authorizing a welder to place his 'P' number on a weld he did not perform.

See Appendices, pages 40-41.

Given its holding that the trial court properly entered a judgment in favor of Bechtel nothwithstanding the jury verdict, the Court of Appeal, in accordance with California Code of Civil Procedure section 629, determined it need not address the trial court's order granting Bechtel's motion for a new trial. See Appendices, pages 3, 42.

On May 3, 1989, the California Supreme Court filed its Order Denying

Review After Judgment by the Court of Appeal in this matter.

At no time, either before the trial court, or in his appeal from the trial court's judgment in favor of Bechtel or in his petition for review to the California Supreme Court, did the petitioner, Slayton, ever raise the issue of whether California Code of Civil Procedure section 629 was repugnant to or in violation of the Seventh Amendment of the United States Constitution or any other federal constitutional or statutory provisions. Indeed, petitioner never raised any federal questions in the state courts below.

SUMMARY OF ARGUMENT

The Petition for Writ of

Certiorari filed by Charles N. Slayton should be denied.

The federal questions which the petitioner seeks to have reviewed by this Court have never previously been raised by the petitioner below. The petitioner has never raised any federal questions either in the court of first instance or in either of the California appellate courts which were asked to review the trial court's judgment. Indeed, the petitioner has failed to comply with Rule 21.1(h) of the Rules of The Supreme Court of the United States in that he has made absolutely no reference in his petition to the stage in the proceedings at which the federal questions were raised nor has he provided any of the other

information called for in that Rule.

Furthermore, the federal questions sought to be reviewed are not substantial in light of prior decisions of this Court. Indeed, petitioner has failed to set forth any reasons in his petition to justify review which comport with the kinds of reasons identified in Rule 17 of this Court's Rules. The petitioner has not shown that the federal questions he seeks to have reviewed have been decided in conflicting ways by different state courts of last resort. Nor has the petitioner identified an important question of federal law decided by a state court in this proceeding which has not been, but should be, settled by this Court or which has been

decided in a way in conflict with applicable decisions of this Court.

The petitioner's central contention in his petition is that California Code of Civil Procedure section 629, governing the granting of judgments notwithstanding the verdict, violates the Seventh Amendment of the United States Constitution. However, this Court has held that the Seventh Amendment does not apply to the states and is not made applicable to the states through the Fourteenth Amendment. Therefore, the petitioner's central contention is entirely without merit.

Furthermore, it is worthy to note that this Court has held on a number of occasions that a federal court's grant of judgment notwithstanding the

verdict does not violate a party's rights under the Seventh Amendment to the United States Constitution.

Petitioner's other contentions are equally without merit. Pursuant to California Code of Civil Procedure section 629, where a judgment notwithstanding the verdict is affirmed on appeal, a trial court's alternative order granting a motion for a new trial is moot and should be dismissed.

In this instance, the California appellate court properly did not address the order granting Bechtel's motion for a new trial while addressing all other issues raised by the petitioner in his appeal.

Finally, petitioner seeks review of the decision of the California

Supreme Court in Foley v. Interactive Data Corp. regarding the absence of tort remedies for a breach of the implied covenant of good faith and fair dealing in the employment context. The decision in Foley was of absolutely no consequence to the decision reached by the California Court of Appeal in this matter. That issue is simply not relevant to these proceedings.

ARGUMENT

I.

THE PETITION SHOULD BE DENIED AS NO FEDERAL QUESTIONS WERE RAISED OR PASSED UPON IN THE STATE COURTS BELOW

Whether the requirement stands as a jurisdictional bar or merely as a prudential restriction, this Court

has long refused to review federal questions which were not raised and passed upon in state court. Illinois v. Gates (1983) 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527.

In Webb v. Webb (1981) 451 U.S. 493, 496-7, 501, 101 S.Ct. 1889, 68 L.Ed.2d 392, this Court stated:

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. . . .
>
> . . . At the minimum,

however, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.

In Bankers Life & Casualty Co. v. Crenshaw (1988) 486 U.S. 72, 108 S.Ct. 1645, 100 L.Ed.2d 62, this Court noted that "[i]n determining whether to exercise jurisdiction over questions not properly raised below, the Court has focused on the policies that animate the 'not pressed or passed upon below' rule. These

policies are first, comity to the States, and second, a constellation of practical considerations, chief among which is our own need for a properly developed record on appeal." 100 L.Ed.2d at 72-73.

In this instance, petitioner has failed to raise in the state courts below any of the federal questions for which he seeks review in this Court. Indeed, he has failed to comply with Rule 21.1(h) of the Rules of The Supreme Court of the United States by omitting any reference in his statement of the case to the stage of the proceedings below in which any federal questions were raised and passed upon. He has simply argued that the issues he presented to the state appellate

court "in effect" draw into question a federal question. This is clearly an insufficient basis for review by this Court.

Whether on jurisdictional or prudential grounds, this Court should deny the petition on the basis of petitioner's failure to raise or have passed upon any of the federal questions he is seeking to have reviewed by this Court.

II.

THIS PETITION SHOULD BE DENIED FOR LACK OF A SUBSTANTIAL FEDERAL QUESTION

In Equitable Life Assurance Society v. Brown (1902) 187 U.S. 308, 311, 23 S.Ct. 123, 47 L.Ed. 190, this Court observed:

But it is settled that not

every mere allegation of a Federal question will suffice to give jurisdiction. "There must be a real substantive question on which the case may be made to turn," that is, "a real, and not a merely formal, Federal question is essential to the jurisdiction of this court." Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise

> appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail. [Citation omitted.]

In this instance, in light of this Court's previous decisions, as discussed in greater detail below, petitioner has failed to raise any substantial federal questions. See Walker v. Sauvinet (1876) 92 U.S. 90, 23 L.Ed. 678; Baltimore and Carolina Line v. Redman (1935) 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636; Neely v.

Martin K. Eby Construction Co. (1967) 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed.2d 75; Montgomery Ward & Co. v. Duncan (1940) 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147.

For this reason, the petition should be denied.

III.

THE SEVENTH AMENDMENT DOES NOT APPLY TO THE STATES AND IS NOT MADE APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT

Petitioner asserts that "[t]he basic premise upon which this Petition for Writ of Certiorari is directed to this Court" is that a California state trial judge's power to grant judgment notwithstanding the verdict "is unconstitutional in view of the Seventh Amendment to the

United States Constitution." See Petition, pages 27-28. Petitioner cites no authority in support of his position.

Indeed, petitioner's position is untenable. This Court has consistently held that the Seventh Amendment to the United States Constitution does not apply to the states and is not made applicable to the states through the Fourteenth Amendment to the United States Constitution. Walker v. Sauvinet, supra, 92 U.S. 90; Alexander v. Virginia (1973) 413 U.S. 836, 93 S.Ct. 2803, 37 L.Ed.2d 993; Melancon v. McKeithen (ED La 1972) 345 F.Supp. 1025, 1027, 1035-45, 1048, aff'd sub nom Mayes v. Ellis (1972) 409 U.S. 943, 93 S.Ct. 289, 34 L.Ed.2d 214,

and Hill v. McKeithen (1972) 409 U.S. 943, 93 S.Ct. 290, 34 L.Ed.2d 214.

Hence, petitioner's challenge to California Code of Civil Procedure section 629 fails to raise a substantial federal question.

Furthermore, it is significant to note that this Court has held that the power of a trial judge and appellate court in the federal judicial system to grant judgment notwithstanding the verdict does not violate the Seventh Amendment to the United States Constitution. Baltimore and Carolina Line v. Redman, supra, 295 U.S. 654; Neely v. Martin K. Eby Construction Co., supra, 386 U.S. 317; Montgomery Ward & Co. v. Duncan, supra, 311 U.S. 243.

For these reasons, the petition

should be denied.

IV.

THE CALIFORNIA APPELLATE COURT PROPERLY DID NOT ADDRESS THE TRIAL COURT'S ORDER GRANTING BECHTEL'S MOTION FOR NEW TRIAL

In his petition, petitioner seems to contend that the California Court of Appeal erred in failing to address in its decision the trial court's order granting Bechtel's motion for a new trial. See Petition, Question Presented C., pages iii-iv.

Petitioner's contention is incorrect. Furthermore, such a claim fails to raise a federal question.

California Code of Civil Procedure section 629 provides, in pertinent part, as follows:

If the court grants the

> motion for judgment notwithstanding the verdict or of its own motion directs the entry of judgment notwithstanding the verdict and likewise grants the motion for a new trial, the order granting the new trial shall be effective only if, on appeal, the judgment notwithstanding the verdict is reversed. . .

In this instance, the Court of Appeal affirmed the judgment notwithstanding the verdict. As such, petitioner's appeal from the trial judge's order granting Bechtel a new trial became moot and was dismissed. Kaake v. Lott (Cal. Ct. of Appeal, 2d Dist. 1967) 252

Cal.App.2d 895, 60 Cal.Rptr. 843. The Court of Appeal appropriately considered all other issues raised by petitioner in his appeal.

V.

PETITIONER MAY NOT REQUEST HYPOTHETICAL ADVICE FROM THIS COURT REGARDING THE FOLEY DECISION

In the fifth issue which he seeks to have reviewed by this Court, petitioner requests that this Court review the California Supreme Court's decision in Foley v. Interactive Data Corp. on the ground that its preclusion of tort remedies for breaches of the implied covenant of good faith and fair dealing in employment contexts violates the Fifth and Fourteenth Amendments to the United States Constitution.

This is another instance in which petitioner seeks to pose a federal question which he never raised or had passed on in the state courts. For that reason alone his petition should be denied.

But, in addition, as he has done before, petitioner is attempting to place the cart before the horse and to pose an issue irrelevant to these proceedings in the hope that it will be a basis for review. Indeed, petitioner raised the issue of the Foley decision before the California Supreme Court in his petition for review. At that point, he raised only the issue of its retroactivity, despite the fact that the Court of Appeal had explicitly held that it did not have to reach that issue in

rendering its decision. See Appendices, page 31, footnote 18. The California Supreme Court denied the petition for review.

On this occasion, petitioner argues that "[t]he reason we are concerned with Foley is that in the event this Court grants its writ of Certiorari as herein prayed it will be concerned with that portion of the verdict that was set aside as above set forth which awards $600,000.00 in punitive damages for the violation of the covenant of good faith and fair dealing which has been held by the California Supreme Court to be present in every case in California -- that is except in employment contracts as held by Foley." See Petition, pages 21-22 (emphasis

added).

Not only does petitioner misstate the substance of the Foley decision, but he concedes that the issues it addressed are merely hypothetical at this time in his case and not a basis for granting the petition. Indeed, this Court will not consider hypothetical issues or issues that are not ripe. Aetna Life Ins. of Hartford v. Haworth (1937) 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617. The Foley decision had absolutely no effect on the outcome of petitioner's action in the state courts.

For these additional reasons, the petition should be denied.

CONCLUSION

Petitioner has filed a frivolous petition for writ of certiorari with

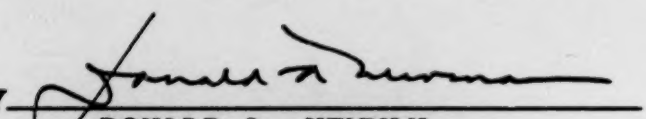
this Court. He seeks review of issues which were never raised or passed on in the state courts below. He has raised federal questions for the first time in his petition but has failed to cite, address or distinguish prior decisions of this Court which have directly addressed the questions. And he has failed to set forth any special and important reasons justifying review in accordance with Rule 17 of this Court.

Indeed, there are no reasons justifying review in this instance. Respondents respectfully request that the petition be denied.

DATED: October 26, 1989

Respectfully submitted,

THELEN, MARRIN, JOHNSON & BRIDGES

By 

DONALD A. NEWMAN
Attorneys for Defendants-
Respondents BECHTEL
POWER CORPORATION and
BECHTEL CONSTRUCTION, INC.

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